Past Sense

Studies in Medieval and Reformation Traditions

Edited by

Andrew Colin Gow (*Edmonton, Alberta*)

In cooperation with
Sylvia Brown, *Edmonton, Alberta*
Falk Eisermann, *Berlin*
Berndt Hamm, *Erlangen*
Johannes Heil, *Heidelberg*
Susan C. Karant-Nunn, *Tucson, Arizona*
Martin Kaufhold, *Augsburg*
Erik Kwakkel, *Leiden*
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Christopher Ocker, *San Anselmo and Berkeley, California*

Founding editor
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Past Sense

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By

Constantin Fasolt

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For Jean

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Let us suppose—to take one among many possible examples—that the historian is confronted with excessive poverty in a society of great wealth, such as the poverty of the British working classes during the early stages of the Industrial Revolution. The natural human reaction to such conditions is one of anger and indignation because these conditions are against the dignity of man. If I describe these conditions without permitting my indignation to interfere, I have lifted this particular phenomenon out of its context in human society and have thereby robbed it of part of its nature, deprived it of one of its important inherent qualities.

HANNAH ARENDT

• • •

It is not only agreement in definitions, but also (odd as it may sound) agreement in judgements that is required for communication by means of language. This seems to abolish logic, but does not do so.

LUDWIG WITTGENSTEIN

⁘

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Abbreviations

[. . .]	Square brackets enclose text that does not form part of the original
{. . .}	Curly brackets enclose text added by the author for this volume
<. . .>	Angle brackets enclose emendations taken from manuscripts
a.	ante
C.	Causa
c./cc.	capitulum or canon/capitula or canons
Clem.	*Constitutiones Clementinae*
Clm	Codex latinus monacensis
Cod.	*Codex Iustinianus*
D.	Distinctio
d.	dictum
des.	desinit
Dig.	*Digestum*
inc.	incipit
Inst.	*Institutiones*
ms./mss.	manuscript/manuscripts
n./nn.	note/notes
Opera	Hermann Conring, *Opera*, ed. Johann Wilhelm Goebel, 7 vols. (Brunsvigae: Meyer, 1730)
p.	post
PI	Ludwig Wittgenstein, "Philosophical Investigations," in *Philosophische Untersuchungen = Philosophical Investigations*, ed. P. M. S. Hacker and Joachim Schulte, trans. G. E. M. Anscombe, P. M. S. Hacker, and Joachim Schulte, 4th ed. (Chichester: Wiley-Blackwell, 2009), 1^{e}–181^{e}
PL	Jacques-Paul Migne, ed., *Patrologiae cursus completus. Series Latina*, 221 vols. (Paris: Migne, 1844–1902)
PPF	Ludwig Wittgenstein, "Philosophy of Psychology—A Fragment [previously known as 'Part II']," in *Philosophische Untersuchungen = Philosophical Investigations*, ed. P. M. S. Hacker and Joachim Schulte, trans. G. E. M. Anscombe, P. M. S. Hacker, and Joachim Schulte, 4th ed. (Chichester: Wiley-Blackwell, 2009), 182^{e}–243^{e}
pr.	principium
q.	quaestio
QOT	*Quod omnes tangit ab omnibus approbari debet*
sig.	signature mark
VI	*Liber sextus*
X	*Liber extra*

For a detailed explanation of abbreviations in references to canon and civil law see Brundage, "Appendix I."

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Changes and Revisions

For the most part the studies in this volume are reproduced in the form in which they were originally published. I have updated neither the text nor the footnotes in any systematic way but I have made some changes and revisions that deserve to be spelled out.

As a general matter I have modified the text, notes, and bibliographical references to conform to the same style; tacitly corrected typographical errors; changed expressions that struck me as unreasonably ungrammatical, infelicitous, or misleading; and inserted the page breaks of the original pagination in curly brackets {. . . | . . .}. Occasionally I have added information that came to my attention after the original date of publication. Whenever these additions were significant enough to deserve being identified as such, I have done so in one of two ways: wherever it was practicable, I have enclosed them in curly brackets {. . .}; where that was not practicable, because old and new text are running together, I have inserted footnotes to explain what I changed. I have also tried to make the tables in "A New View of William Durant the Younger's *Tractatus de modo generalis concilii celebrandi*" more effective and added two new figures and a new table: a figure illustrating the manuscript transmission of Durant's treatises, a figure illustrating the main differences between the manuscripts and the printed editions, and a concordance of the manuscripts and the printed editions.

I have made two more substantial changes. First, I have translated "Die Erforschung von Wilhelm Durants d. J. *Tractatus de modo generalis concilii celebrandi*" and "Die Rezeption der Traktate des Wilhelm Durant d. J. im späten Mittelalter und in der frühen Neuzeit" into English. Second, I have substantially revised and expanded "The Manuscripts and Editions of William Durant the Younger's *Tractatus de modo generalis concilii celebrandi*."

The purpose of the original article on this subject was simply to communicate the results of my attempt to locate all surviving manuscripts of Durant's treatise. I made a few observations about the contents and history of each manuscript, pointed readers to the relevant printed catalogs and scholarly literature, and identified the printed editions. But I did not believe it necessary to reproduce manuscript descriptions available in the printed catalogs or share all of the unpublished details about the physical description, contents, and history of the manuscripts that had been communicated to me by scholars whom I had asked for their assistance and who were kind enough to help a graduate student writing his dissertation at the time.

After this article was published, Jürgen Miethke chided me for having neglected to describe the manuscripts as fully as desirable. Since then I have learned to appreciate

much better how difficult it sometimes is to lay one's hands on published catalogs, and how useful even tiny details of a manuscript description can be. On this occasion I have therefore not hesitated to reproduce information from the published catalogs and included all of the information I received in private correspondence. I have also engaged in a new round of correspondence, this time by email, in order to make the manuscript descriptions as thorough and detailed as possible without actually traveling to the collections where the manuscripts are being held—and I am very happy to be able to acknowledge the generosity of the scholars who responded to my requests for help. I will name and thank each of them individually at the appropriate places following in the text.

For a while I toyed with the idea of rewriting this article from the ground up. But given how much I have learned about William Durant the Younger's treatises since the time when it was first published, that would have forced me to write a completely new article. It would also have removed all traces of the conditions under which the original was written. That did not seem appropriate. I have therefore limited myself to adding new information—enough to make this version about twice as long as the original—undoing stylistic and grammatical lapses that now strike me as egregious, and correcting mistakes, most of them minor, one of them, concerning the provenance of B, major. I marked all such changes according to the method described above: whenever it made sense, I placed added information between curly brackets; where old and new information ran together I added a note to explain what had been changed. Apart from that I left the original intact.

Manuscript Sigla

B	Vatican City, Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487
C	Kues, St. Nikolaus Hospital, ms. 168
M	Munich, Bayerische Staatsbibliothek, Clm 6605
Ma	Paris, Bibliothèque Mazarine, ms. 1687
O	Vatican City, Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823
P	Paris, Bibliothèque Nationale, ms. lat. 1443
R	Rome, Biblioteca Nazionale Centrale, Fondo Varia, ms. 1
Tr	Troyes, Bibliothèque Municipale, ms. 786
Tu	Tours, Bibliothèque Municipale, ms. 237
Z	Zurich, Zentralbibliothek, ms. S 204 0

Introduction: A Program of Research

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In the fall of 1975 I arrived in New York to study history at Columbia University with John Mundy, J. M. W. Bean, Robert Somerville, Eugene Rice, and Paul Oskar Kristeller. That had not been a foregone conclusion. Before I came to the United States, I had been studying philosophy. Growing up in Bonn in what was then West Germany, at a time when the Holocaust and World War II were barely over and the Cold War was at its height, in an upper class family of mixed German, Russian, English, and Irish ancestry, with similarly mixed traditions in literary, military, aristocratic, and business life, baptized Russian Orthodox, classified Lutheran at school for purposes of religious instruction, and living in a solidly Catholic part of Germany—had left me with some basic

* I would like to thank the members of the Early Modern Workshop at the University of Chicago, particularly Mohamad Ballan, for giving me their feedback on an incomplete draft of this introduction. I owe a special debt to Jean K. Carney for her comments on the completed draft.

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questions: What is going on? Is this the way it is supposed to be? Could it be something else? How can I tell? I wanted a means of orientation. I thought philosophy might be that means.

It did not turn out that way. What I learned from reading philosophy at the universities of Bonn from 1972–74 and Heidelberg from 1974–75—particularly Kant, Husserl, Heidegger, and Aristotle—has never been far from my mind. But it did not give me what I was looking for. Most of philosophy seemed to require mastering issues of great theoretical complexity for reasons that never became coherent and were all too far removed from the questions whose urgency I felt pressing in on me, but of which I could not tell how they were to be asked, much less how to be answered. The rest of philosophy seemed to boil down to a variety of intellectual history. I had no idea what I had missed and I did not find out until much later.

That led me to believe that history might well be better suited to my purpose. History had been one of my minor fields of study from the beginning. It seemed to be the polar opposite of philosophy and therefore a good way to hedge my bets. It boasted little theoretical complexity, asked a straightforward question, and used a simple method to find answers. The question was: "What happened?" The method was: "Study the evidence!" It was completely opportunistic. Whatever method led to evidence and made the evidence lead to results was fine. It made far less ambitious claims than philosophy, but seemed to back them up with better reasons. Above all, it focused on what was in fact the case. The case was what I wanted to understand.

I started by casting my net as wide as possible without having to use more than the languages with which I was familiar.[1] I had no interest in any special field or aspect of history. I was interested in history as such: a discipline that promises an understanding of change over time. I hoped it would give me a perspective on my place in time without making unwarranted assumptions. But I also knew that history as such is nothing that anyone can study. I needed to settle on some specific subject in order to find out what history as such can teach. The question was: Which subject would that be? I ran the gamut of survey courses in ancient, medieval, modern, and contemporary European history. I took lectures, proseminars, and seminars. I was introduced to bibliography, paleography, and diplomatics. I settled on medieval history.

---

1 German, English, French, Latin, and Greek. I used French and Latin as a basis on which to make myself somewhat familiar with Italian and Spanish. I also learned a modicum of Russian, but that was mostly for the sake of understanding conversations between my father and his mother.

Modern history seemed too close. I thought that studying a time so close to mine would risk begging the very questions I wanted answered. That was a risk I did not want to take. Ancient history, by contrast, seemed too far removed from where I wanted to go—and the well-known ways in which the ancient world has often been said to resemble the modern one more closely than the Middle Ages struck me as optical illusions. The Middle Ages lay in the middle distance. They seemed to occupy a place in time not so close that it could be mistaken for the present and not so far away that the present could not be clearly seen from there. They were so thoroughly unlike the present that they seemed difficult to understand. But the people living there were hardly less intelligent or capable of making sense than we, and surely more closely related to ourselves than ancient Greeks and Romans. If they were difficult to understand, I thought, it was because they had used their intelligence to make a different kind of sense. That was precisely what I found appealing. I thought that learning to understand the sense they made would give me the criteria I needed to figure out what sense we make today.[2]

It also seemed a good idea to study in the United States. I had family in New York and had spent time with them on an extended visit in 1967, which left me with an indelible impression of how different life could be from what it was in Germany. I thought that looking at Europe from over there would make it easier for me to see what I was trying to discover over here. I was also confident that graduate school in the United States would give me better training than I had found in Germany, where too many students were merely biding their time and too many professors content to leave them alone.

I was encouraged by my father and Hubert Jedin, a great historian whom I had known since childhood as a friend of the family. Jedin had once turned down an offer from Harvard because his visit to the United States persuaded him that, as he put it, he could not breathe where so little history was in the air. At the same time he made it very clear that I should go. He said it would give me an opportunity to teach something to Americans they did not understand about Europe, and something else to Europeans who could not bring themselves to look beyond the limits of their own narrow historical experience, among whom he explicitly included himself. He thought it was important for me to seize that opportunity. I visited Harvard, Princeton, Yale, and Columbia. I applied for admission to Harvard and Columbia. Harvard turned

2 Throughout this introduction I shall use the words 'we,' 'us,' and 'our' without defining them. The reason is simple: I know what they mean, but I do not know to whom they refer. I only know that they do not refer to all of my readers, or only to my readers, or to the same group of people on every occasion. I offer my apologies to anyone who feels improperly included.

me down. Columbia offered me a fellowship. I accepted. That, in brief, is how my career began.

* * *

With the exception of two books, an edition and translation, and a dozen primary sources translated for the *University of Chicago Readings in Western Civilization*, the twenty studies collected in this volume comprise most of my work in the following thirty years.[3] I have divided them into three parts.

Part one consists of seven studies devoted to William Durant the Younger, the subject of my first book. Durant was born ca. 1266 in Puimisson near Béziers and ruled the Gévaudan, a rugged territory in the Massif Central in southern France, as bishop of Mende and count of Gévaudan from 1296 until his death in 1330. I have called this part "Holding On," because holding on is what William Durant the Younger was trying to do: holding on to the supremacy of the church and the allegiance of the laity; holding on to his own position; holding on to his conviction that he knew what was right, what needed fixing, and how it needed to be fixed; holding on to a whole understanding of the right order of the world that he saw slipping away and that was destined to lose its sway over Europe in the following centuries. I studied William Durant the Younger because it seemed to me that he was speaking directly to the deepest fears and highest hopes of his age.

Part two consists of seven studies devoted to Hermann Conring, the subject of my second book—though not its subject in a sense that earned his name a place on the title page, annoying readers who believed that they knew better what my book was about. Conring was born in Norden near the coast of East Frisia in 1606, studied at the universities of Helmstedt and Leiden, both of which were in the vanguard of Protestant intellectual life in Northern Europe at the time, and spent the rest of his life at the University of Helmstedt: as professor of natural philosophy from 1632–37, professor of medicine from 1637–81, professor of politics from 1650–81, and as a practicing physician all the time. I have called it "Moving On," because moving on is what Hermann Conring was trying to do: moving on from the upheavals of the Thirty Years War to peace; moving on from violence, superstition, and oppression to liberty and reason; moving on from a past that had suffered from false ideas about religion, church, and empire to a future founded on sovereign states, autonomous

3 The books are *Council and Hierarchy* and *The Limits of History*. The edition and translation is *Hermann Conring's New Discourse on the Roman-German Emperor*. The translations of primary sources are *University of Chicago Readings in Western Civilization*, 4:55–66, 87–95, 164–9, 304–12, 360–7, 369–77, 383–402, 434–46, and 6:103–37.

individuals, and science. I studied Hermann Conring because it seemed to me that he, too, was speaking directly to the deepest fears and highest hopes of his age.

Part three consists of six studies devoted to our understanding of the changes Europe underwent during the centuries leading from the days of William Durant the Younger to those of Hermann Conring—the period of history now generally called 'early modern.' They focus on the forms in which we have been trying to make sense of those changes and the concepts in which that sense has until recently been crystallized, like 'politics,' 'religion,' 'state,' 'church,' 'law,' 'right,' 'sovereignty,' 'empire,' 'history,' 'reformation,' 'science,' 'fact,' 'idea,' 'subject,' 'object,' 'reason,' 'truth' . . . the list is easy to extend. These studies are founded on my understanding of what William Durant the Younger and Hermann Conring meant by writing what they did and what their writings meant—which is not the same.[4]

What they meant and what their writings meant is of course not representative of European history in any of the senses usually evoked by the idea of 'representation.' It is not even representative of the history of European legal, historical, or political thought. But one can say of them what Virginia Woolf said about masterpieces: "Masterpieces are not single and solitary births; they are the outcome of many years of thinking in common, of thinking by the body of the people, so that the experience of the mass is behind the single voice."[5] Because the experience of the mass was behind their single voices, the writings of William Durant the Younger and Hermann Conring can illuminate the essence of early modern European history. That essence is the subject of part three.[6] I have called it "Come and Gone: Past Sense" and chosen *Past Sense* as the title for the whole book as well because it is meant to show how Europe came to commit itself to certain elementary beliefs from which we are by now so far removed that we can say their sense is past.

Each of these parts is arranged in the chronological order in which the studies in that part were written, which is largely the same as that in which they

4 I shall have more to say about the difference between 'what they meant' and 'what their writings meant' later on.

5 V. Woolf, *Room of One's Own*, 68–9.

6 Because I am well aware how many readers will bristle at my use of the term 'essence,' especially in such close proximity to 'history,' I should point out that I use 'essence' in the sense in which it was used by Wittgenstein: "*essence* is expressed in grammar," and "grammar tells what kind of object anything is." *PI* §§ 371, 373; cf. §§ 65, 89, 92, 95, 116, 239, 241, 429, 562, and 564. I shall have more to say about this, too.

were published.[7] The three parts themselves follow each other in an order that is also roughly chronological, but with some overlap: part two was begun ten years before part one was finished; part three was begun twelve years before part two was finished; and part three was finished only one year after part two. The studies closing parts one and two are meant to sum up some of the main lessons that can be learned from the preceding studies in that part. The final study in part three, "Hegel's Ghost: Europe, the Reformation, and the Middle Ages," can serve as a conclusion to the whole volume.

These studies are a disparate lot. The first was published in 1978, when I was still in graduate school, the last in 2008, after twenty-five years of service at the University of Chicago. Some are long, some are short. Some are densely annotated; some have hardly any notes at all. Some were written when I had barely learned how to write English academic prose, others when I was confident that I was able not just to say what I meant, but say it well. Three were originally written in German, in part to demonstrate that I had not entirely forgotten my mother tongue. Some are occasional pieces, others the fruit of many years of thinking, writing, and rewriting. Some are preliminary studies, fragments, or offshoots of the books I was writing at the same time. Others are only indirectly related to the books. Some were published in widely read journals, others in conference proceedings and *Festschriften* unlikely to have reached far beyond the circle of those immediately involved.

Two reasons prompt me to present all of these studies in one volume here. One is simply to make them more accessible, particularly those that appeared in places far from the beaten track. The other is that in spite of their disparities they constitute a whole, with a beginning, middle, and end.

I did of course not plan them like that. They were planned one at a time. They differ from each other in method, form, and substance. They went through many twists and turns that took me in directions I had not expected and in one instance abruptly changed my whole career. They certainly do not make up the kind of project for which I could have applied to anyone for funding. But their unity is more than autobiographical: they are held together by a guiding desire, follow a single line of inquiry, and lead to a definite conclusion. The desire is to come to terms with the condition of our time. The line of inquiry runs from evidence and highly technical investigations in medieval

7 There are two exceptions: nr. 2 was written a year before nr. 3, but published a year later; nr. 4 was written years before nr. 5, but published years later. I might add that nr. 20 began as a paper I gave in German in 1999 and published in 2001 under the title "Europäische Geschichte, zweiter Akt: Die Reformation," but did not translate into English until Tom Brady convinced me to do so in 2003 and kept revising and expanding until 2008.

and early modern history via Wittgenstein's *Philosophical Investigations* and reflection on the nature of historical research to a break with historicism, an affirmation of anachronism, and a broad perspective on the history of Europe. The conclusion is that history can very well serve as a means of orientation, but only if we pay more attention to language and imagination than may be possible within the limits of the historical profession.

That conclusion has changed my mind about the study of the past and made me look in new directions.[8] From hindsight I can thus say about the studies collected here what I could not have said when I was writing them. They amount to a coherent program of research that I began in graduate school and that has now fulfilled its purpose. In the remainder of this introduction I will try to explain how it took shape, what it established, and what it leaves to be desired for the future.

One—Holding On: William Durant the Younger (ca. 1266–1330)

In the fall of 1976 I took my first seminar with John Mundy. Mundy's habit was to ask the members of his seminar to focus on one text, or several texts by the same author, and to prepare a handout for class discussion. The handout—reproduced by mimeograph or, more precisely, spirit duplication in aniline purple type—was supposed to run somewhere from ten to twenty pages and consist of three main sections: a chronology of relevant events, a bibliography of primary and secondary sources, and a selection of whatever excerpts from the writing in question struck the student as particularly interesting. Mundy would usually add some excerpts of his own. After a brief introduction by the presenter, the seminar was spent translating and discussing these excerpts.

At Mundy's suggestion, I prepared such a chronology, bibliography, and selection of excerpts for William Durant the Younger's *Tractatus de modo generalis concilii celebrandi*, or *Treatise on How to Hold a General Council*, in which Mundy had been interested for some time. The title is not authentic. It was invented by some later copyist. Durant never seems to have called his book anything other than *Tractatus*. It is somewhat misleading, too. His book was really a massive set of detailed proposals for the reform of church, state, and society.

8 For some steps in those directions see "History and Religion," "Respect for the Word," "Saving Renaissance and Reformation," and especially "Breaking up Time." I hope to take more in the future.

Not much later I asked Mundy if he had any suggestions for a subject on which to write a dissertation. He gave me five. One of them was Durant's *Tractatus*. I liked it better than the other four. I asked Jedin for his opinion. He thought Durant's treatise was perfect for a dissertation: poorly understood today, but widely known and influential at the time. I submitted a proposal. In October 1978 my proposal was approved and I began to write my dissertation.

The most obvious reason for choosing Durant's *Tractatus* as my topic was that it was best remembered for two specific demands no one had made in public with such clarity and force before: according to Durant no laws of any kind were to be passed or changed without the participation of a council, and general councils were to meet every ten years in order to consider the laws governing all of Christendom. Because church history is now a relatively narrow specialty, modern readers, including historians, rarely appreciate just what that meant. It meant that governments of any kind—large or small, local or universal, temporal or spiritual, royal, imperial, or papal—were to be stopped from passing new laws or changing existing laws without consulting the people who were affected by those laws, and that a representative assembly of the clergy, the laity, and experts from leading universities was to meet every ten years in order to make sure that the people would have regularly recurring opportunities to express their views on matters concerning all of Christendom. General councils had been meeting since antiquity, but their membership had been more limited, their meetings had never been legally required, and even during the preceding two centuries, when they were meeting more frequently than at any earlier or later time, they had met at an average of only once in thirty years.

This was no matter of mere theory. Durant submitted his proposal to the Council of Vienne (1311–12)—just such a council representing all of Christendom—in hopes of achieving constitutional reform. His hopes were dashed. But his ideas were to the point and they were not forgotten. A century later the Council of Constance (1414–18) enacted legislation that gave general councils supreme authority in matters of faith, schism, and general reform, including the right to force the pope to follow their decisions. It also required such councils to be convoked every ten years. That was a major turning point in the development of government by representative assemblies, and almost the same as what Durant had asked a century before. There was good reason to believe that his countless proposals concerning other issues would cast a similarly diagnostic light on circumstances going far beyond his person.

There were also pragmatic reasons to make Durant's *Tractatus* an attractive topic for a dissertation. It had definite limits: an author, a text, and a closely related set of questions. Exactly why did he propose that general councils should meet every ten years? Exactly what did he have in mind? What does that tell us

about him? What does it tell us about his time and place? At the same time the great variety of issues Durant addressed allowed me to range as far and wide as I saw fit. The revival of liberal Catholicism in the aftermath of World War II and the Second Vatican Council had made Durant more interesting to more historians. Yet no one had managed to make sense of what appeared to be a mixture of unnecessary repetitions, blatant contradictions, and bad organization. The text had been published in several early modern printed editions, one of which had conveniently been reprinted at some unspecified date in the 1960s, but none of them seemed reliable. Durant was frequently confused with William Durant the Elder (ca. 1230–96), his uncle, namesake, predecessor as bishop of Mende, and one of the most influential jurists of medieval Europe, known as the Speculator after his most famous book, the *Speculum Iudiciale* or *Speculum Iuris*. What little scholarship there was—a handful of articles, chapters in books, and mostly boilerplate biographical sketches—was shot through with uncertainties and mistakes. In short, there was a lot to do that no one had done before, and there were obvious criteria for setting clear priorities.

The most important reason for choosing William Durant the Younger's treatise as the subject of my dissertation, however, had nothing to do with the *Tractatus* as such, and everything with the kind of document it was. It had been written by someone disturbed by his belief that things were bad, and thoroughly determined to stop them from getting worse. It gave me a means of studying what I wanted to know: what human beings do to find their way through changes that they did not initiate and that exceed their understanding. It helped that William Durant the Younger's way through those changes seemed to have met with the approval of a great many other people disturbed by similar beliefs at roughly the same time. It helped as well that it was part of the same history that had brought Europe to the point at which I met with it when I was growing up. Perhaps it could give me some of the criteria I needed to sort out my place in time.

The Manuscripts and Editions of William Durant the Younger's **Tractatus de modo generalis concilii celebrandi**

The first order of business was to track down the surviving manuscripts and printed editions. A few scholars had made passing remarks about one or another of those manuscripts and editions, but no one had tried to find them all or studied them in detail. I was not planning to produce a critical edition, at least not at that time. But I had every intention of making sure that I would know what Durant had actually written.

I was lucky to be able to draw on the advice of Paul Oskar Kristeller, both because Kristeller knew as much or more about Latin manuscripts in Europe

during the period from 1300–1600 than anyone else, and because he had persuaded Columbia University Library to purchase as many published catalogs of such manuscripts held in public and private libraries and archives across the world as possible. That made Columbia's collection of such catalogs one of the finest of its kind.

I spent a few months leafing through those catalogs, looking at tables of contents and checking indices for the title of the *Tractatus* and various spellings of Durant's name: under D for Duranti, Durantis, Durant, or Durandus; under G for Guglielmus, Guglielmo, Guillaume, and Guillermo; and under W for William and Wilhelm. I read through sections labeled 'anonymous' and looked at every entry recording the works of William Durant the Younger's uncle, knowing that Durant's treatise might well have been catalogued with the works of the Speculator, with whom he was so regularly confused. If a catalog did not have an index, I scanned its contents as best I could. I bought a copy of Kristeller's *Latin Manuscript Books before 1600*—a list of catalogs and inventories of libraries and archives with manuscript collections—and put a checkmark next to the title of every catalog I had looked up in order to keep track of the work I had completed. When I was done, I thus knew both which libraries and archives I had checked for manuscripts of the *Tractatus* and which I had not, either because their manuscript catalogs were not available at Columbia University or because none had been published.

There were hundreds of such libraries and archives. I sent a letter to as many of them as I could, asking if they had any manuscripts of Durant's *Tractatus*. I received close to three hundred replies, mostly from German, French, and English librarians and archivists. Replies from Italy and Spain were more sporadic. Replies from beyond the Iron Curtain were virtually nil. I sent similar letters to individual scholars whom my teachers knew to specialize in the study of late medieval manuscripts.[9] At the same time I searched for printed editions of the *Tractatus* in the catalogs of the Bibliothèque Nationale in Paris, the British Museum, and the *National Union Catalog*: online catalogs did not exist.

When I was done I knew of ten manuscripts. I ordered microfilms of all of them. I also knew of six printed editions. I ordered microfilms of these editions, too. Then I gathered as much information about each of these manuscripts and editions as I could—their form and content, identifying marks, the places where they had been described, their history—and published the sum of my results in the *Annuarium historiae conciliorum*, a relatively new journal seeking to promote an understanding of the historical significance of councils.

9 Most helpful were Gilbert Ouy, Marie-Thérèse d'Alverny, Adriana Marucchi, Martin Bertram, and Neil Ker.

This was my first scholarly publication. Two things went wrong with it, one substantive and serious, the other formal and funny. Serious was a mistake I made about the provenance of a manuscript now held in the Vatican Library with the designation Barb. lat. 1487, meaning, codex nr. 1487 in the Barberini collection of Latin manuscripts. I found a description of this same manuscript in a book on the manuscript libraries of Padua that Jacobus Philippus Tomasini (1596–1655) had published in 1639, under the heading of manuscript VII in the old library of San Giovanni in Verdara.[10] That led me to conclude that the manuscript now known as Barb. lat. 1487 and held in the Vatican Library had once been owned by that library. But I was wrong. Tomasini did in fact describe Barb. lat. 1487 in some detail, but left no doubt that it was not at all the same as manuscript VII in the old library of San Giovanni in Verdara. He owed the description of Barb. lat. 1487 to his friend Leone Allacci (1586–1669), and described it only because he thought the comparison with manuscript VII was interesting. I had not read Tomasini carefully enough.

I should have been alerted to my mistake as soon as I mentioned my 'discovery' to Kristeller. Kristeller reacted with a mixture of interest and surprise. It was, he said, the only instance he had ever come across in which a Barberini manuscript could be traced back to the library of San Giovanni in Verdara. He thought that was remarkable. What was remarkable, of course, was only my mistake. I did not notice the significance of Kristeller's surprise until Jürgen Miethke noticed my mistake and published a correction in *Quellen und Forschungen aus italienischen Archiven und Bibliotheken*, 61 (1981): 450–2. It was of course Kristeller who was the first to tell me about Miethke's review. I still have the photocopy he gave me with a handwritten annotation to identify its source. I wrote to Miethke right away to thank him for having saved me from repeating my mistake. That marked the beginning of a long and fruitful friendship with a remarkable scholar to whom I have been grateful ever since for many instances of interest, kindness, and support.

The funny thing was an embarrassing mistake in English. My spoken English was all right. My written English lagged behind. Needless to say, I worked hard on making sure that the English prose of this, my first scholarly publication, would be, if not elegant, at least correct. I never spent more time and effort on reading and correcting proofs. But for reasons that I was never able to determine, the page proofs—the final version of the text I saw before it went to press—were altered after I had seen and corrected them. Somehow they did not make it on to the printed page unscathed. Fortunately most of the changes were minor and unobtrusive. Unfortunately one of them, though minor,

10 Tomasini, *Bibliothecae Patavinae*, 12–15.

was only too obtrusive. It came in the first sentence: "There ist no thorough study. . . ." I could virtually hear the German accent: "Zairr issst no sssorrow study. . . ." It was humiliating. But it was also very funny.

A New View of William Durant the Younger's Tractatus de modo generalis concilii celebrandi

The next step was to compare the manuscripts both with each other and with the printed editions. Only two of the ten manuscripts contained all of the text. Fortunately these two were also the oldest and most reliable. Five other manuscripts contained most of the text. The remaining three contained only fragments of the beginning. All of them had flaws of one kind or another but comparing them with each other helped to remove most of the doubts I had about the accuracy of whatever version I was reading.

The first printed edition was published by Jean Crespin in Lyon in 1531. Crespin reproduced a manuscript that has been lost since then. Because that manuscript may have been better than the surviving manuscripts, at least in some regards, I used his edition as another witness to the text. The other printed editions differed from Jean Crespin's in many ways. But all of them were clearly based on his. They cast no independent light on Durant's writing. Crespin's edition thus was the only one I really needed to consider.

It quickly dawned on me that the manuscripts arranged the *Tractatus* quite differently from the printed editions. The printed editions treated it as a single book divided into three parts. The manuscripts, by contrast, seemed to treat part three as though it had been a separate piece of writing. The parts had different lengths as well. Part one was equally long in the manuscripts and the editions: four chapters and three unnumbered 'rubrics.'[11] But part two was much longer (one hundred chapters versus seventy-two), and part three was much shorter (forty chapters versus sixty-three). What was going on?

The first clue came when I compared the end of part two and the beginning of part three in the manuscripts with the printed editions: it was the same. Another clue came when I looked more closely at the manuscript chapters seventy-two to ninety-nine in part two that seemed to be missing from the printed editions. They were not missing at all. Apart from minor differences at the beginning and the end, they were identical to chapters two to twenty-nine of part three in the printed editions. They had merely been moved from their original location. But why?

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11 Five chapters in the edition by Philippe Le Preux of Paris, 1545, where the chapters and rubrics are divided up differently.

I do not remember how I found out. I do remember that I found out after I noticed that in Crespin's edition the last chapter of part two was numbered one hundred, as in the manuscripts, even though there were only seventy-one chapters preceding it. That gave me an idea: What if it was not that chapters seventy-two to ninety-nine had been moved forward from part two to part three? What if it was instead the beginning of part three that had been moved back, and then all of the following chapters had been renumbered? The idea was confirmed when I discovered that chapter thirty of part three in the printed editions contained a passage that corresponded almost word for word to a passage right in the middle of chapter seventy-one of part two in the manuscripts.

Now I knew what had happened: two relatively short but widely separated pieces of text had traded places with each other. One of them had been taken from the middle of chapter seventy-one in part two; the other, of roughly the same length, from the end of part two and the beginning of part three. It was pure coincidence that the second piece of text spanned the dividing line between parts two and three. But it had the unfortunate result that, when it traded places with the other piece, the dividing line between parts two and three landed in the middle of chapter seventy-one in part two. Someone who noticed what now looked like a mistaken numbering of the chapters following the beginning of part three renumbered them to suit the new arrangement. Instead of being numbered chapters seventy-two to ninety-nine (in the original part two) and chapters two to thirty (in the original part three), they were now conflated into a single part and consecutively numbered one to sixty-three. Part two was left truncated at seventy-two.[12]

That left one question to be answered: Why would two widely separated pieces of text have traded places with each other? For anyone who knows how manuscripts are put together, that is not hard to imagine. Manuscripts consist of one or more gatherings of sheets that are folded into half and then sown together, like the sections of a newspaper, except that the sections of a newspaper are not sown together. Assume that a manuscript fell apart, or was taken apart because the binding had gone bad and needed to be repaired. Assume that it was put back together—but only after the outermost sheet of one gathering (of one section of the newspaper) had accidentally been folded backwards. Now the first leaf of this gathering (of the newspaper section) had become the last, and the last had become the first. Two equally long pieces of text separated from each other by the entire contents of the gathering had traded places with each other. The text of those pieces obviously did not make

12 Careful readers may notice that the numbers do not add up. For the reasons see below, pp. 173–4.

good sense in its new location. But medieval copyists focused on copying what they saw, not on understanding what they were copying. Once the rebound manuscript had been copied again, perhaps repeatedly, in different manuscripts with gatherings of different lengths beginning and ending at different points in the text, it would have been hard to recognize what had happened. It would have been much easier to notice that the chapters in part three seemed to be oddly numbered: not i, ii, iii, iv, v, and so on, but i, lxxii, lxxiii, lxxiv, lxxv, and so on. It would have been easy to jump to the conclusion that the Roman numerals were wrong and to 'correct' the numbering. Voilà: part two would have consisted of seventy-two chapters, and part three of an amalgam of sixty-three.

Once I knew that the printed editions had garbled the parts and chapters of the *Tractatus*, and once I had looked more closely at the text Durant had actually written, something else became apparent. The garbled sequencing was not merely a matter of moving two bits of text around. It affected a major point of substance. Durant had actually not written one book divided into three parts. He had written two separate books. One of them was written before the Council of Vienne had met. That book consisted of part one and part two with all of its one hundred chapters. One could tell it had been written before the council met because it referred to the council in the future tense. Because it was so much longer than the other, I called it *Tractatus maior.* The other book was written while the council was in session. One could tell because it referred to the council in the present tense and concluded with a notice stating that it had been "dictated" at the council by the bishop of Mende. That book consisted of forty chapters. Because it was so much shorter, I called it *Tractatus minor*.

Much of the *Tractatus minor* simply repeats ideas that can be found in the *Tractatus maior*, too, but it is by no means the same kind of work. The differences are many, and they concern matters of form as much as substance. The most important difference is that Durant dropped his program for constitutional reform and his pronounced reliance on the obligatory force of ancient law. He said nothing about convening general councils every ten years and he abandoned his sustained attack on papal exemptions of monks and friars from episcopal control. Instead of calling for controversial limits on the power of central government, he called for reforms with which virtually everybody could agree: better education, better care of souls, and better observance of the liturgy. His criticism of the papacy was no less pointed than before, but it was muted by a heightened stress on papal primacy. His argument changed from conclusive to admonitory. His reasons changed from legal to moral. His method changed from technical to rhetorical.

We cannot be certain exactly what moved him to make those changes. But there is one compelling explanation: Durant's demands for constitutional reform were met with real hostility. Pope John XXII later claimed that Durant had tried to provoke a schism between Pope Clement V and the bishops assembled at Vienne. That may be an exaggeration. But there is no doubt that Durant found himself rebuffed. Most likely he wrote the *Tractatus minor* in order to redeem himself, omitting what had provoked the most hostility, condensing what he had previously written, and keeping what he thought stood the best chance of being put into effect. That makes the *Tractatus minor* good evidence for his response to opposition, but not for the plans with which he went to the council. No wonder historians had previously not been able to make much sense of the *Tractatus de modo generalis concilii celebrandi*.

Research on William Durant the Younger's Tractatus de modo generalis concilii celebrandi: *A Critical Review*

Having established a text that I could trust, and having found out about the main differences between the *Tractatus maior* and the *Tractatus minor*, I was eager to turn to the question what Durant had actually tried to achieve, and why. But there was still one other thing I needed to do first, namely, take a close look at what others had previously written about Durant. That did not take long. There were only a handful of chapters and articles communicating the results of original research. But it was nonetheless revealing. It taught me as clearly as John Mundy had promised me it would that the positions historians take tend to match their confessional background more closely than one might expect in the age of professional historical scholarship.[13]

The first historian after the French Revolution, and one of the most interesting to take a serious interest in William Durant the Younger, was Ignaz von Döllinger (1799–1890), an ardent Catholic opponent of the absolutist tendencies characteristic of the ultramontane papacy in the nineteenth-century heyday of what the papacy regarded as its battle with the modern world for the survival of the church. In a wide-ranging book about the role of councils and the pope published in 1869, Döllinger mentioned Durant's criticism of the late medieval papacy and his demand for general councils because they agreed

13 As Mundy once put it to me in a marginal note on a draft of one of the chapters of my dissertation in an inimitable formulation I must unfortunately cite from memory because I no longer have that draft, but remember well because one of Mundy's gifts was to express himself in memorable turns of phrase: "There are among modern scholars Catholics—curial/papal, conciliar, members of the orders—various shades of Protestants, and secular Levites masquerading, and sometimes acting, as 'scientific' historians."

with his attempt to stop the papacy from making papal infallibility official Catholic dogma. "If one looks at it from the viewpoint of the ancient church from the days of the Apostles down to about 845," he wrote, "what the papacy has become since then looks like a disfiguring, pathological, and suffocating tumor on the organism of the church, stunting and corroding its vitality and bringing sundry scourges in its wake."[14] Like Durant, Döllinger did not pull any punches and like Durant, Döllinger did not succeed. In 1870 the First Vatican Council made papal infallibility official Catholic dogma. Old Catholics split from the official church, and for more than a generation Catholics did not publish any new research on William Durant the Younger.

Protestant historians briefly took an interest in Durant around the turn of the twentieth century. Like Döllinger they saw him primarily as an opponent of the papacy who wanted to bring the church back to its ancient shape. But one suspects that, unlike Döllinger, they had no sympathy for his devotion to canon law. They might have given him a warmer welcome if he could have been treated as a precursor of the Reformation. Unfortunately that was impossible. He was as ardent a champion of canon law and ecclesiastical supremacy as any pope who ever lived. There was no trace of anything like salvation by faith alone in any of his writings. No Protestant historian wrote anything significant about Durant thereafter.

Catholics began to pay renewed attention to Durant after the turn of the century, perhaps because the so-called modernism crisis renewed resistance to papal monarchy. But when they did, they were at pains to distance themselves from the position that Döllinger had taken and tried to rescue Durant from what they seem to have regarded as Protestant misinterpretations. They stressed his loyalty to the Catholic Church and sought to make light of the more pointed charges he leveled against the papacy by characterizing them as expressions of youthful exuberance, naiveté, or otherwise discountable departures from his own better judgment—never mind that at the time this young man was well into his forties and had already proved himself to be a leading expert in canon law. As far as they could tell, Durant was a loyal and well-meaning son of the church who did not in the least intend to challenge the papacy.

That changed after World War II, when Pope John XXIII prepared the way for the Second Vatican Council and opened the door to major church reform. In that setting Catholic historians like Hubert Jedin, Brian Tierney, and Francis Oakley turned to the task of bringing church history up to date without allowing themselves to be maneuvered into the isolation that Döllinger had suffered.

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14 Döllinger, *Papst und Concil*, viii–ix, my translation.

Jedin established how crucial the conciliar movement was to the Catholic Reformation.[15] Tierney proved that conciliar theories limiting papal power were not heretical, but deeply embedded in canon law itself.[16] And Oakley showed that, contrary to the impression created by the victory of Ultramontanism in the late nineteenth century, conciliar traditions survived long after the Council of Trent and did not lose their vigor until the First Vatican Council cast them into oblivion by making the papacy's absolute predominance over the church the touchstone of Catholicism in one of the sharper breaks in church history.[17] All three placed Durant firmly in the long arc of conciliar traditions that were rooted in antiquity and peaked in the late Middle Ages, treating him as a keen observer of the ills afflicting the church and showing sympathy for his proposals for reform.

In its small way the history of scholarly attention to William Durant the Younger thus reflects both the grip in which confessional hostilities were holding the imagination of historians well into the twentieth century and the relaxation of those hostilities in the aftermath of World War II. That increased my confidence that I might have something useful to say about William Durant the Younger, not merely because both Catholic and Protestant scholars seemed to have become more willing to pay attention to a late medieval bishop whose ideas fell squarely between the chairs of papal absolutism and Protestant revolution, but also because I myself was falling between those chairs. In this context having been baptized Russian Orthodox, classified Lutheran at school for purposes of religious instruction, and raised in a Catholic part of Germany looked more like an asset to scholarship than a source of confusion.

Quod omnes tangit ab omnibus approbari debet: *The Words and the Meaning*

These three preliminary studies assured me that I knew what Durant had written and what others had written about him. When they were finished, I set about the work that needed to be done in order to understand his treatise in both of the dimensions I mentioned above: what he meant by writing it and what his writing meant separately from what he meant. The results went straight into the dissertation I finished in 1981 and the book that was published in 1991. There is no need to repeat them here. The most important were summed up in "William Durant the Younger and Conciliar Theory," on which I shall have more to say below. There was one central issue, however,

15 Jedin, *Geschichte*.

16 Tierney, *Foundations*.

17 Oakley, *Conciliarist Tradition*.

that seemed to deserve a separate publication, namely, the famous principle Durant invoked in making his conciliar demand: *Quod omnes tangit ab omnibus approbari debet*, "What touches all must be approved by all." That principle was obviously crucial. But what exactly did it mean?

At first sight its meaning may seem so blindingly obvious that it is hardly worth closer examination. It seems to mean that measures affecting all the people have no validity unless the people have given their consent. It looks like an endorsement of popular sovereignty. It was by no means peculiar to Durant. It was a commonplace whose history can be traced back to Roman law. It was regularly quoted by Durant's predecessors and contemporaries as a justification for constitutional limits on royal and papal power. When it was applied to the entirety of Christendom, as in the case of Durant's *Tractatus*, it seems difficult to take as anything other than proof that the roots of modern democracy lie in the Middle Ages, especially in canon law and theories devised by canon lawyers to deal with corporations that had their own legal personality, and in the right of the members of such corporations to affect or even to control decisions made by the corporation's head.[18] At first sight, in other words, it seems that Durant was calling for a form of constitutional government in which the will of the people would be supreme and general councils were meant to express that will.

A closer look however shows this to be a case of wishful thinking that glosses over a longer, more complicated, and more interesting history. It does no justice either to the magnitude of the obstacles that needed to be scaled before democracy became conceivable or to the ingenuity and patience of the people who did the scaling. Detailed research by expert historians with an interest in the origins of modern democracy has turned the obvious reading of "What touches all must be approved by all" into a classic illustration of the extent to which appearances can be deceiving.[19]

Durant founded his case on two principles that were, if not directly opposed to popular sovereignty, at least completely different in origin and meaning. One was the superiority of the clergy over the laity. He was as firm in his support of ecclesiastical supremacy as his archbishop, Giles of Rome, with whom he collaborated at the Council of Vienne and whose treatise *On Ecclesiastical Power*, one of the most exorbitant vindications of ecclesiastical supremacy ever written, he recommended enthusiastically to his readers. The other was the

18 Thus Tierney, *Foundations*, and Tierney, *Religion*.

19 The most important work was done by Gaines Post in a series of articles collected in his *Studies in Medieval Legal Thought*.

rule of law. From his perspective, the well-being of the commonwealth—what he called *res publica*—depended entirely on the degree to which everyone, the people as well as the people's rulers, temporal as well as spiritual government, obeyed the law. The law was more for him than just a body of rules. The law gave voice to justice, equity, and reason. It was a sacred matter. It proceeded directly from the will of God. The will of the people, let alone the will of their rulers, was utterly beside the point.

The trouble with the law, of course, was that the law needed to be applied to changing circumstances. Some circumstances were so peculiar and some changes so profound that old laws had to be changed and new laws enacted. Such changes posed grave dangers. You had to get them right. If you did not, instead of giving voice to justice, equity, and reason, you had subverted the rule of law.

That was the danger Durant's conciliar proposal was meant to combat. He never actually demanded that "What touches all must be approved by all." He merely used it as a reason to justify what he did actually demand. What he did demand was that no laws ought to be passed or modified without the participation of general councils and that such councils ought to meet every ten years. Not once did he maintain that general councils ought to be able to impose their will on a recalcitrant pope. Not once did he address the question what was to happen in case the council and the pope could not agree. That is the single most important point on which his demand differs from the Council of Constance's decree *Haec sancta*, which did make it explicit a hundred years later that at least on such fundamental issues as faith, schism, and general reform the council had the right to impose its will on an unwilling pope by force.

This is no oversight. It rather tells us what Durant had in mind when he used "What touches all must be approved by all" to justify his conciliar demand. What he had in mind was not that general councils had the right to impose their will on an unwilling pope or, for that matter, that general estates had the right to impose their will on an unwilling king. It was that no ruler ought to take any measures affecting all of his subjects without first having given his subjects an opportunity to speak their mind. His reasoning was simple, and well supported with quotations from the Old Testament, the New Testament, canon law, and Roman law. It was that no single person, not even the pope, could make the right decision on every matter concerning the whole of Christendom all by himself. But he could with the help of councils. Christ had promised his followers that God would fulfill their wishes if two or three of them were gathering in his name. Councils were gathered in his name. They could be trusted

to determine what was right on all matters concerning all of Christendom. They spoke with the voice of the Holy Spirit and when law had to be changed, the rule of law depended on guidance from that voice.

For these reasons Durant did not even consider the question how to resolve a disagreement between the council and the pope. Such disagreements would have reduced his case to absurdity. Divided councils obviously did not speak with the voice of the Holy Spirit. What would have been the point of calling general councils every ten years if they could not be trusted to give voice to equity, justice, and reason? A council that ended in disagreement was a council that had failed. It could neither maintain the rule of law nor the supremacy of the church. A council made sense only if it arrived at a conclusion that did not pit its members against the pope. Once all the arguments had been duly presented, the council was obliged to render its consent to the decision of the pope. "What touches all must be approved by all" was a procedural requirement. It did not give the council the right to withhold its consent from the decisions of the pope. Conciliar consent, to use a pointed formulation made famous by Gaines Post, was compulsory.[20]

This is by no means to deny that medieval jurists established concepts, theories, and practices without which modern representative institutions would never have begun to play the role we take for granted nowadays. It rather is to insist that the former are separated from the latter by longer distances and deeper changes than could be guessed by reading that "What touches all must be approved by all." Nor is it to belittle the considerable power a council might well have exercised over the pope in practice, even without a formal right to withhold its consent or to enforce its will. It is merely to insist that Durant did not demand such a right and that his argument contained no justification for making such a demand. Pope Boniface VIII himself included the principle that "What touches all must be approved by all" among the rules of law that make up the concluding section of the *Liber sextus*, the code of canon law he published in 1298. Like Giles of Rome, Boniface VIII is often said to have made the most exaggerated claims on behalf of papal supremacy in all of medieval Europe. If he saw fit to declare that "What touches all must be approved by all," there is good reason to suspect that this particular rule of law did not (yet) limit the exercise of papal power quite as strictly, and did not (yet) advance the principle of popular sovereignty quite as far, as might at first be thought. As long as politics continued to be viewed as subject to law, popular sovereignty was difficult to justify. Even today, after all, the question exactly how to reconcile democracy with the rule of law remains wide open.

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20 Post, "Romano-Canonical Maxim."

At the Crossroads of Law and Politics: William Durant the Younger's 'Treatise' on Councils

Tractatus is the only word of which we can be certain that Durant used it to refer to the *Tractatus maior*. It has an obvious English analogue: 'treatise.' Because the analogy is obvious, I relied on it unthinkingly until, at some point during the writing of *Council and Hierarchy*, I realized that I had never tested its reliability. Once I had asked the question, it did not take much digging to find out that *tractatus* meant something more interesting than the vague "literary composition dealing more or less formally or systematically with definite subject" as which 'treatise' is defined in the *Concise Oxford Dictionary*.[21] That, too, seemed worth a separate publication.

In the first place, *tractatus* was closely related to a specific issue, namely, conflicts between different laws and different interpretations of those laws. Since ancient Roman times it had been used to refer to the activity of experts involved in resolving such conflicts by negotiation and analysis, as well as to the writings resulting from such negotiation and analysis. In that sense *tractatus* was something that lawyers did or wrote in order to resolve a conflict between different laws.

In the second place, the writings that medieval jurists called *tractatus* were mostly organized in one of two ways: by subject matter or by the books in which the laws were written. Those organized by subject matter focused on the different solutions one could give to a specific problem by drawing on different laws. They sought to resolve the differences between those solutions in some systematic and comprehensive fashion. Those organized by books focused, not on any specific problem, but on the larger problem posed by differences between whole sets of different laws addressing a variety of different issues, and they attempted to resolve the differences between those sets. There was a whole class of such treatises, and many were explicitly entitled "treatise on differences."

In the third place, *tractatus* came to be applied to negotiations at the assemblies called by medieval lords. That kind of *tractatus* was also closely related to conflicts between different laws and different interpretations of laws, but the personnel did not consist of lawyers, and it was not restricted to purely legal matters. The personnel consisted of leading figures in the temporal and spiritual realm, and their *tractatus* consisted of negotiating with their rulers about the well-being of the commonwealth. That added a distinctly political dimension to *tractatus*.

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21 *Concise Oxford Dictionary*, 7th ed., 1142.

All three of these meanings applied directly to the *tractatus* Durant wrote for the Council of Vienne. The central issue he addressed was typical: a conflict between two sets of different laws, namely, the canon law of antiquity and canon law as it had developed since the twelfth century under the leadership of the papacy. Most of the second part of the *Tractatus maior* was organized according to the sequence of canons in the collection from which he had taken them. We do not know exactly which collection that was. Most likely it was one or another version of the so-called *Collectio Hispana*, amplified by the famous Pseudo-Isidorian decretals. We do know that the sequence was roughly chronological. Arranging canons in chronological order had been standard practice during the early Middle Ages. But since the eleventh century canon law had been given a systematic arrangement and chronological collections had fallen out of use. By presenting the ancient conciliar canons in their chronological order, Durant's *tractatus* thus heightened the contrast between ancient and modern canon law. In this sense, his treatise resembled a treatise on differences in the technical sense.

Above all else, Durant's *tractatus* sat precisely at the crossroads between law and politics. On the one hand, it was squarely founded on canon law, and sharply focused on conflicts between different bodies of law. On the other hand, it did not resolve those conflicts. It rather submitted them for consideration to the Council of Vienne. It amounted to the first step in a political proceeding that Durant hoped to carry to a successful conclusion in the negotiations to be conducted at the council, and the conclusion was supposed to resolve the problem he had identified: the difference between ancient and modern canon law.

The meaning of the word *tractatus* thus casts an unexpectedly bright light on the substance and purpose of the work Durant submitted to the Council of Vienne. It was not the meaning we tend to associate with 'treatise.' It demonstrates how closely writing in general and writing a *tractatus* in particular was related to the exercise of power, and how far it was removed from purely private or theoretical affairs. Durant's *tractatus* treated law as part and parcel of politics and politics as part of law. It thus points to a specifically medieval understanding of the relationship between politics and law. That understanding has largely vanished from sight since then. In our world the law is, or is at least supposed to be, distinct from politics.[22] The only area where that is not the case so clearly consists of the relations between states. There is no sovereign who legislates for those relations. 'Treaty'—a word that is derived from *tracta-*

22 I should point out that the distinction is never absolute and that, for reasons rooted in early modern history, it became much stricter in Europe than in America.

tus and refers to legal arrangements governing relations between states—may therefore be the only word still carrying the meaning *tractatus* had for Durant: a piece of writing in which politics cannot be told apart from law.

The Reception of William Durant the Younger's Treatises in Late Medieval and Early Modern Times

The question how well William Durant's ideas were received in late medieval and early modern Europe led too far afield for me to deal with it directly in *Council and Hierarchy*. It is also more difficult to answer than one might think. We know that Durant managed to exercise substantial influence on the legislation passed by the Council of Vienne, in spite of the hostility with which Pope Clement V, and even more so Cardinal Jacques Duèse, the future Pope John XXII, viewed his proposals for wholesale constitutional reform. There are also a handful of instances in which we can be certain that his treatise was behind recommendations made in the fifteenth century. The Council of Constance adopted the ten-year period for general councils. Leading theologians like Pierre d'Ailly (1351–1420), Jean Gerson (1363–1429), and Nicholas of Cusa (1401–64) were not merely familiar with his work in general terms, but relied on it for guidance on some specific issues. Durant, however, went to extraordinary lengths to couch his demands in terms quoted verbatim from canon law. That helped to make his demands compelling, but it complicates the task of measuring the extent to which his ideas were taken up by others. It is easy enough to find cases in which later writers quoted laws they might well have taken from Durant's treatise. But usually it is next to impossible to tell whether they quoted his treatise or merely the same legal source he had quoted.

It is much easier to judge the recognition Durant received in later times by tracing the history of the manuscripts and printed editions in which his treatise circulated. The numbers—ten manuscripts, most of them incomplete, and six printed editions—may not seem large. But they are larger than those of some other and far more famous works in the history of medieval political thought.[23] The treatise was definitely known at the Council of Constance (1414–18), attracted more attention at the Council of Basel (1431–49), and continued to be read throughout the early modern period, particularly in connection with the Council of Trent and the disputes pitting French Gallicans against the papacy. No less telling is the standing of the people who owned a manuscript or were involved in one of the printed editions. Some of them, like Peter Nümagen (ca. 1450–1515), Guglielmo Sirleto (1514–85), and Pierre Pithou

23 The *Defensor Minor* by Marsiglio of Padua is famously preserved in a single manuscript that languished in obscurity until it was discovered in the nineteenth century.

(1539–96), were highly regarded at the time, but are not well remembered now. Others, like Pope Benedict XIII (1328–1423), Nicholas of Cusa (1401–64), Jean-Baptiste Colbert (1619–83), and Jacques-Bénigne Bossuet (1627–1704), rose to such heights of power, influence, and intellectual distinction that their names are recognized outside specialist circles. That is more than enough to secure Durant a respectable position among the writers of late medieval and early modern Europe whose works were taken seriously by later generations.

William Durant the Younger and Conciliar Theory

My study of the reception of Durant's ideas was published in 1991, the same year as *Council and Hierarchy*. It was the last piece of original research that I devoted to Durant. "William Durant the Younger and Conciliar Theory" was published a few years later. It sums up the conclusions that research established, not to everybody's, but certainly to my satisfaction.

These conclusions are best presented in three parts. The first concerns what Durant meant with his conciliar proposal. He meant that the commonwealth in general and the church in particular badly needed reform, and that general councils, convoked at regular intervals and authorized to be consulted whenever general legislation was to be passed or altered, were the best means to reform them. He was no enemy of the papacy, neither was he a proto-democrat, he was not in favor of popular sovereignty, and he had no concept of the general will. He surely knew of the sophisticated theories of corporations and corporate personalities advanced by thirteenth-century canonists. But he did not make them the basis of his case. His case was based on law. He was convinced that God ruled the world by law, and that he had entrusted his law to a hierarchy whose reach was universal, whose apex consisted of the bishop of Rome, and whose clerical members governed the laity by leading them with good examples. He was as loyal and ardent a proponent of ecclesiastical supremacy as any pope. He was convinced that there was nothing wrong with the foundations of the church as they had been established in antiquity and modified in the great papal revolution of the eleventh century. Like Giles of Rome he insisted on the right of the church to exercise its powers of jurisdiction independently from, at a higher level than, and directly over temporal powers. What troubled him was that the church had strayed from the law on which its supremacy depended. He was afraid that "the faith, which is dead without works according to St. James, will be considered by believers and unbelievers alike to have perished through the fault of the prelates and the clergy, . . . [and that] events incomparably worse than those of the past will follow, and all of them will be blamed upon our lord the highest pontiff, his venerable college of cardinals,

and this sacred council."[24] He was certain that the Church of Rome was by far the worst offender, not because its offenses were extreme, but because it set an example for all of Christendom. His call for general councils was meant to recall the church to its foundations and restore the allegiance of the laity. He was a true reformer: determined to go back to a past that he believed had been corrupted by misguided policies pursued by popes, monks, mendicants, and other guilty parties. He had no wish to change the system. He was holding on to the system with all his strength and intelligence.

The second part of these conclusions concerns the circumstances that prompted Durant to advocate reform along such lines and to back down when he ran into opposition. He regarded the authority of bishops over monks, friars, and the nobility as the main pillar supporting the authority of the church over the laity. On this understanding the greatest danger to the church consisted of the steadily proceeding encroachment by papal and royal governments, all too often in collusion with monks, friars, and the nobility, on the control of bishops over their dioceses. He recognized an opportunity in 1301, when King Philip IV clashed with Pope Boniface VIII. In 1307 he managed to obtain a favorable settlement of his disagreements with Philip IV in the so-called *Paréage of Mende*, which gave the Gévaudan a form of governance that lasted until the French Revolution. He hoped to settle his disagreements with the papacy as well by moving the Council of Vienne to adopt the measures he advocated in the *Tractatus maior*. But there he was disappointed. By the time the council met, Pope Clement V and King Philip IV were fast restoring good relations, and Durant had to retreat. The nature of his retreat is amply documented in the *Tractatus minor*. Though he spent the remainder of his life in high office, he never really challenged the papacy again.

The *Tractatus maior* and the *Tractatus minor* thus tell us how Durant hoped to roll back, or at the very least to stop, the advance of central government, and how he changed his plans when his hopes proved to be unrealistic. They document a short stretch of time when circumstances were favorable to his plans. That time began with a sharp disagreement between the pope and the king of France, which opened a window of opportunity through which Durant was able to envision real constitutional reform. It ended when Pope Clement V moved to Avignon and resumed friendly relations with the king of France at the Council of Vienne. The opportunity had passed and the window closed.

The third part of these conclusions concerns the meaning of Durant's two treatises for our understanding of late medieval and early modern history. That

24 Fasolt, *Council and Hierarchy*, 300.

meaning is quite different from what he wanted to convey. He wanted to reassert the rule of law, but in the very act of calling for a return to ancient law, he proved how far the church had moved away from its foundations. He took his guidance from canons he discovered in an old chronological collection, but in the very act of communicating his discovery, he proved that those canons had failed to stop the church from losing its way before and could therefore hardly be relied upon to prevent the church from losing its way again. He called for general councils in order to strengthen the rule of law, but in the very act of making his call, he raised the question how to resolve a conflict between the council and the pope. These are definite implications of his argument. They are written all over his proposals and sometimes they take shape in starkly divergent formulations of his goals. But he never spelled them out. He could not spell them out without raising a doubt about the possibility of his success, a doubt he could not bring himself to face. The meaning of his treatises conflicts with the meaning he wanted them to have. That was a fatal weakness, and the weakness was revealed as soon as the pope confronted him. Unwilling to spell out the implications of his argument himself, he was forced to agree with them when they were spelled out for him.

It is important to be precise about the conflict at issue here. It does not consist of the differences between the *Tractatus maior* and the *Tractatus minor*. The conflict is firmly embedded in each of these two books. The differences between the books are merely evidence for what it is. The conflict is especially not to be confused with logical contradictions. It is rather a straightforward and perfectly familiar instance of what happens when human beings fail to make up their minds. It pitted Durant against himself. It is as elementary as the distinction between what 'I mean' and what 'it means,' that is, between meaning expressed in the first person present indicative and meaning expressed in the third person present indicative.

The difference between the first person and the third person may well seem to be a matter of purely linguistic or grammatical significance. But it goes straight to the core of human life. To give a plain example, consider someone saying 'five times five is thirty.' The meaning of what that person says is obviously not that 'five times five is thirty.' We know that five times five is twenty-five. The meaning of what that person says is what it tells us about that person, as maybe 'this person does not know how to multiply,' or 'this person is drunk,' or 'this person does not know English well,' or 'this person is making a joke,' and so on. Exactly what the meaning is depends entirely on circumstance. The possibilities are infinite—except that one possibility is excluded. Whatever 'five times five is thirty' means, it does not mean what the person says it means: that five times five is thirty.

It must be stressed how simple this example is. It is simple because it consists of a single sentence and the sentence concerns arithmetic. Matters are more complicated when the sentences are many and do not concern arithmetic. The complications rise to a whole different level when people take conscious advantage of the difference between what 'I mean' and what 'it means,' for example, to make a joke, to deceive their interlocutors, or to express their contempt, as in 'that is a fine piece of work' said with a tone that changes the overt meaning into its opposite. Spy novels specialize in complications of this kind. They demonstrate the pleasure we take in understanding such complications in exquisite detail without thinking even for a second about the grammar of the distinction between what 'I mean' and what 'it means,' the meaning of my words and the meaning I want my words to have.

It also needs to be stressed how deeply this distinction affects our lives. Oedipus is a good example. Oedipus vows to avoid his fate and then fulfills his fate by trying to fulfill his vow. That makes the meaning of his vow the opposite of what he meant. When he discovers the difference between the meaning of his intention and the meaning of his vow, he suffers agony and blinds himself. This difference constitutes the substance of tragedy. Unhappiness is not enough, however deep. Tragedy reveals the truth by tearing it apart.

Take examples closer to home: a child who is told that he or she has been adopted; a wife who finds out that her husband has had an affair; a creditor whose debtor turns out to be a fraud; a believer who loses faith. Take Freudian slips. In Freudian slips the conflict lies, so to speak, between what 'I mean' and what 'Id means.' Each of these cases turns on the discovery of a difference between the meaning of my words and the meaning I want my words to have. Such discoveries reveal something about myself without my knowledge or against my will. Their effects can range from mild surprise, amusement, and embarrassment to despair, madness, murder, and suicide. They can shatter a human being. This helps to understand why we try hard never to have to reckon with differences between what 'I mean' and what 'it means.'[25]

That is precisely what Durant did not manage to do. He did have to reckon with differences between what 'I mean' and what 'it means.' He said things he did not want to say, betrayed fears he did not want to feel, and raised hopes in which he had no trust. He was struggling against himself, his hands were tied by his own argument, and ultimately he was defeated by his own efforts to prevail. That explains the mood and tone of his writing: the mood is grim; the tone despairing. Both convey the opposite of what he had in mind.

25 For a more substantial treatment of this issue see Fasolt, "Breaking up Time."

Durant was unique in his particulars, of course. But he was utterly commonplace in two basic regards: his trust in the rule of law and his belief that church and state needed to be reformed. As he believed that true obedience to ancient laws would save the church, so did his age. As he struggled to face the possibility that the foundations on which he had staked his case were crumbling under the weight he placed on them, so was his age. As he hoped against hope that pope and council would stand shoulder to shoulder in the cause of reform, so hoped his age. As he was forced to contemplate, against his will, the very future he had hoped to avoid, so was his age. In those regards, his treatises really were "the outcome of many years of thinking in common, of thinking by the body of the people."

On a small scale, in a specific instance, the fate of William Durant the Younger thus foretold the fate of Europe in late medieval and early modern times. The fate of Europe took place on a much grander stage and took much longer to unfold. But it was driven by the same kind of disagreement with oneself and followed a similar course. If William Durant was one of the first to experience that fate, it was because he was especially well versed in law, especially exposed to the advance of central government, especially eager to achieve reform, and blessed with a rare opportunity to act on his convictions. The window of opportunity that Philip IV's dispute with Boniface VIII opened briefly for him was going to be opened much wider, for much longer, and for many more people by the Hundred Years War, the Great Schism, and the Hussite Revolution. His lonely request to give general councils a leading role in church reform was going to be widely repeated and given a much sharper edge by the conciliar movement. But just as the window of opportunity closed for Durant at the Council of Vienne, so it did across the length and breadth of Europe in the fifteenth century, and for the same reasons. As soon as the Council of Constance had put an end to the Great Schism, the papacy began to retrieve the power it seemed to have lost. When Pope Eugenius IV succeeded in restoring friendly relations with the monarchs of Europe—the kings of France and England, the emperor, the German princes—central governments in state and church resumed their advance with vigor. As his defeat by King Philip IV and Pope Clement V had led Durant to shift his case from law and legal science to virtue, rhetoric, and submission to papal primacy at the Council of Vienne, so the defeat of the conciliar movement led Europe to shift its case from law and reform to Humanism and sovereignty. Small wonder that Durant's proposals in the *Tractatus Minor* for reforming education, the care of souls, and divine worship, coming after his conflict with the pope, read almost like a blueprint for the reforms enacted at the Council of Trent.

The future lay with the very possibilities Durant had raised, but refused to contemplate. Humanism, Renaissance, and Reformation began with plans to reform the church quite like those he had put forth. They ended by rejecting both the ends he set for himself and the means he chose to achieve those ends. The laws with which he hoped to maintain the supremacy of the clergy over the laity lost their public authority to the state and became objects of purely confessional attachment or historical scrutiny. Ecclesiastical supremacy was overturned by rulers claiming a kind of sovereignty that was defined by its exemption, not simply from positive law—that kind of sovereignty had for a long time been asserted by the papacy itself—but specifically from the laws of the papacy. Where once the papacy had exercised jurisdiction over the continent, its jurisdiction was now defined as purely spiritual or indirect, if it was not repudiated altogether. In the end the pope looked like a prince almost like any other.[26] When that prince tried to fulfill his responsibility as head of Christendom by rejecting the terms on which Catholics had made peace with Protestants in 1648 on the grounds that Protestants were heretics, he was roundly ignored.

In the short run this understanding of late medieval and early modern history was the most important result I took away from studying William Durant the Younger's writing. In the long run, the most important result was the significance of the grammatical distinction between the first person and the third person for understanding history *tout court*. It was the most important because it proved that the question I had asked—what was the meaning of Durant's conciliar proposal—was badly put. It was not badly put merely because his proposal had more than a single meaning or because his treatises made more than just one proposal. That much was obvious from the start. It was badly put because it was conceived in terms of more or less logical coherence. It did not merely leave open the possibility that one of the treatise's many meanings might have been basic to the rest in some more or less systematic fashion: it was founded on that possibility. But in fact that possibility did not exist. The meaning of Durant's proposal came in two different kinds; the kinds were grammatical, not logical; and the difference between the kinds was irreducible.

But at the time I had not yet understood the place of grammar in history. I was perfectly well aware of the tension that ran through Durant's work. I documented it in ways that stood up well to every critique I could imagine and every critique I actually received. I used it to formulate an understanding of late medieval and early modern history that has continued to serve me

26 Cf. Prodi, *Papal Prince*.

well since then. But I believed it was a problem that lay, not in grammar, but in some kind of historical 'reality' in which his 'interests' conflicted with his 'ideas.' I tried to solve the problem by doing what we have all been trained to do: I distinguished between text and context, intentions and circumstances, ideas and interests, language and reality, and so on, so that I could fulfill the obligations historicism has sworn us to uphold ever since it first impressed them on us in the nineteenth century. Under the pressure of those obligations I divided Durant's proposals into two parts: one part hierarchical, reflecting his insistence on the law; the other republican, reflecting his desire to go beyond the law. Hence the title *Council and Hierarchy*. That was all right as far as it went. But it went in the wrong direction. It merely cast the same problem in an altered form and thereby made the solution more difficult to find.

I suspect that was the reason why Brian Tierney found it difficult to understand my argument and suggested that perhaps I was making the same point he had once made about the unity of conciliar thought, but in a muddled fashion.[27] I knew Tierney was wrong, but I did not know why. Only much later, when I had taken up the writings of Ludwig Wittgenstein and entered into the world of the *Philosophical Investigations*, I realized that both of us were wrong. He was wrong because it was not a matter of unity and diversity at all, but a matter of grammar. I was wrong because grammar was not a problem. It was the solution.

Two—Moving On: Hermann Conring (1606–81)

Early in 1983 the University of Chicago offered me an appointment as Assistant Professor in the Department of History and the College on condition that I turn myself into a historian of early modern Europe. As the chair put it to me, the department understood that I had been trained as a medieval historian, and it fully expected me to publish a book based on my dissertation. Apart from that, however, it wanted me to teach graduate and undergraduate courses in early modern history, demonstrate significant progress on a research project in early modern history by the time of my review for tenure five or six years

27 "It is not easy to understand Fasolt's underlying attitude to conciliar thought. . . . Fasolt was perhaps making in a muddled fashion the point I noted in *Foundations* (p. 3). 'In strict accuracy, no doubt, one should speak of a collection of conciliar proposals rather than of "the Conciliar Theory"; and yet there was sufficient unity of thought among the various writers to render the latter expression significant and useful'." Tierney, *Foundations* (1998), xiin14, with reference to Tierney, *Foundations*, 3.

down the line, ideally in the form of a second book, and to establish myself as a leading historian of early modern Europe within about ten years. One of my future colleagues put it more succinctly: the less you say about the Middle Ages, the better.

I never found out what prompted the department to make that offer on those terms, but I jumped at the opportunity. I was young and I had no idea that switching fields like that might rob me of both of the most effective means with which to raise my standing in the profession, and thus my salary: securing offers from other universities and supervising many Ph.D.'s. Who was going to make an offer to a medievalist who had abandoned medieval history? Who was going to study early modern history with someone trained in medieval history? I did not reckon with the possibility that medievalists might lose sight of me or even consider me a traitor—I heard some did—and that early modernists might think I was, as they say in Chicago, "somebody who nobody sent." I underestimated how difficult it is to cross the boundary dividing, not the Middle Ages from modernity, but medievalists from modernists, and I did not foresee that writing a book on a late medieval bishop while developing new courses and research in early modern history would give me a case of intellectual double vision. I had a lot to learn.

If someone had explained all that to me, I might have hesitated. But I would not have hesitated long. I would have thought it foolish to turn down an opportunity to make my living at a distinguished university merely because it meant that I would have to move my research forward two or three centuries. To the contrary, it was precisely the opportunity to cross the boundary dividing medieval from modern history that appealed to me. I had already crossed two well-marked boundaries: between philosophy and history, and between Europe and the United States. I was only too happy to cross another one, particularly one that irritated me as much as this one did.

To many historians the tripartite division of European history into ancient, medieval, and modern periods seems to be nothing worse than a convention that is now dated and certainly misleading, but has been superseded by recent research and at any rate does no real harm. To me it seems unjust to the people to whom it is applied, and to blind those who do the applying. It is not merely a problem for understanding European history. It springs from a kind of intellectual tyranny that damages our ability to come to terms both with the past and with ourselves. It cannot be improved by tinkering around the edges: it needs to be faced down. It demands a reconsideration of our treatment of the past, not in its parts, but as a whole. I had chafed under the designation 'medievalist' long before I ever thought of moving to Chicago. By my lights, the University of Chicago was challenging me to enter into battle with an opponent really worth fighting. That was an opportunity I did not want to miss.

It did not take me long to settle on Hermann Conring as the subject of my new research. I had first heard of Conring in a course on diplomatic—meaning the scholarly study of medieval charters and documents—taught by Paul Egon Hübinger (1911–87) at the University of Bonn in the early 1970s. Hübinger had made two points that left a strong impression: that Conring was one of the most significant figures in the development of the critical study of historical documents—more significant perhaps than Jean Mabillon (1632–1707), who is usually the first to be mentioned in this regard—and that Conring had never been given the attention he deserved. When he died in 1681, Conring left a large library, a substantial estate, and hundreds of publications on medicine, the circulation of the blood, natural philosophy, alchemy, the history and constitution of Germany, Roman law, German law, religion, confessional disputes, theology, commerce, statistics, politics, diplomacy, political science, and more. He was a polymath whose writings spread in all sorts of different directions. Like William Durant the Younger he had been held in high regard in his own day, but neglected by historians. His works were barely read in Germany, and the Encyclopedia Britannica did not even know of his existence. If he was mentioned at all, he was usually referred to as "the founder of German legal history," a title awarded him by Otto Stobbe (1831–87), a leading historian of German law, in the inaugural address he gave as rector of the University of Breslau in 1869, at a time when Germany was just about to be unified—the same time, so it happens, when Döllinger was drawing attention to Durant in order to put a stop to papal absolutism.[28] Conring was clearly something different from a historian of law, but what? Was there some rhyme or reason behind his sprawling oeuvre? Was there some goal he had in mind that gave a coherent meaning to his many pursuits? Those questions attracted me, and I had a hunch I might be able to set some of the record straight.

In order to reassure myself that I was not about to go off on a tangent, I asked again for the advice of someone whose judgment I could trust. In this case it was Arnaldo Momigliano (1908–87), an extraordinary scholar whom I was lucky to count among my colleagues and to whom I could talk about Conring without having to explain whom I meant. Momigliano agreed wholeheartedly that Conring was a good subject for new research. His reasons were similar to those that Hübinger had mentioned, except that he added an emphasis on Conring's work as a physician and writer on medicine. What was it, Momigliano asked, that put men with a professional grasp of medicine like Conring and Locke in the forefront of the political thinking of their time? What did they share with predecessors like Marsiglio of Padua and Marsilio Ficino,

28 Stobbe, *Hermann Conring*.

who had distinguished themselves in similar ways during the fourteenth and fifteenth centuries?[29]

The more closely I looked, the more interesting Conring became. Like William Durant the Younger, he seemed concerned with problems he had discerned in the foundations of society and determined to solve them by some sort of reform in which law and legislation were to play an important part. That complemented nicely what I already knew about the history of law. At the same time he belonged to a completely different historical terrain. He was a Lutheran who detested ecclesiastical supremacy, and he was German, not French, from the North, not the South. Like Durant, he was a commoner who built his career on talent, perseverance, and powerful patrons. Unlike Durant, he never held high temporal or spiritual office, but made his living as a physician, professor, and expert adviser to princes and men of state. On balance, he offered an attractive combination of similarity and difference compared to the work I had been doing on Durant and was still doing at the time. I would neither have to begin entirely from scratch nor put myself in danger of saying the same thing twice.

Above all else Conring allowed me to leapfrog the traffic jam of historians clogging all roads to the Reformation. He lived as long after the Reformation as Durant had lived before. He led me straight into a period of German history where traffic was thin, historians seemed to be few and far between, and their attention absorbed by little besides the Thirty Years War and the Peace of Westphalia—a kind of darkened landscape between the Reformation and the Enlightenment, contrasting sharply with the splendor of France's grand siècle, Spain's Siglo de Oro, and England's Hobbes, Milton, and Locke. That gave me a straightforward opportunity to break new ground. But it did more than that, because the new ground was systematically different from the ground I had been covering so far. By Conring's time the case Durant had made was closed. The tide had turned and the terms had changed: the age of reform was gone. What had once made Durant look to the future with fear and foreboding was precisely what made Conring look to the future with hope and anticipation. What Conring wanted was precisely what Durant opposed: freeing states and individuals from being governed by the church.

That contrast was doubtless going to require qualifications. But no qualification was going to lead back to the place where I had left Durant. To the extent that anything in history can be a counterpoint to anything else, Conring

29 As it turned out, I never managed to follow those questions further than to establish that Conring considered medicine, history, and politics to be closely related forms of science; see below, pp. 35–6, 39–43, 57–9.

was such a counterpoint to Durant. That meant that I could use him to run an experiment—or come as close to running an experiment as can be done in history. The experiment was to compare the cases of Conring and Durant in search of reasons for the incoherence over which Durant had foundered. Did Conring, under opposite historical conditions, achieve the coherence that had eluded Durant? If so, the conditions might well have been the reason. Or did he have to battle with the same incoherence? In that case the different circumstances were clearly no explanation.

That was an experiment I really wanted to run. Precisely because it involved comparing a 'medieval' with a 'modern' case, I thought that it might lead me to a criterion with which to judge the meaning of the division of European history into 'medieval' and 'modern' periods. It held the promise of subjecting the hypothesis that history might give me a means of orientation amidst the circumstances of my time to a decisive test. That would have been a handsome return on the investment I had made by agreeing to turn myself into an early modern historian.

Conring on History

As I had done with Durant, I started by making a survey of everything Conring had written and others had written about him. Most of his literary output on subjects other than medicine and natural philosophy was published by Johann Wilhelm Goebel in six massive volumes of *Opera* in 1730, conveniently reproduced in a photographic reprint in the early 1970s. The Special Collections Research Center at the University of Chicago and the Newberry Library held a good number of the books Conring had published in the seventeenth century. The National Library of Medicine in Bethesda had a substantial proportion of his medical writings. The rest, almost without exception, could be found in the Herzog August Bibliothek in Wolfenbüttel, which Conring himself had helped to develop and where many books once belonging to the University of Helmstedt had been sent. That made it easy to lay my hands on Conring's published writings. Once I had traveled to Wolfenbüttel and the Herzog August Bibliothek had sent me the microfilms I ordered, I had virtually everything I wanted to read or thought I might need to consult within reach in Chicago.

The scholarship on Conring was more substantial than that on William Durant the Younger. Since Otto Stobbe had drawn attention to him in 1869, his biography, his contributions to the study of history and law, his work on statistics, his views on politics, and his political activities had all received attention in monographs, articles, and essays. Most of that scholarship was superseded, and almost none of it took notice of his writings on medicine and natural philosophy. As recently as 1981, however, on the occasion of the three-hundredth

anniversary of Conring's death, Michael Stolleis had organized a conference and exhibition in Wolfenbüttel that resulted in the publication of an illustrated catalog and a hefty volume of studies—*Beiträge zu Leben und Werk*—by leading scholars dealing with most aspects of Conring's life and works.[30] Those volumes summarized what had been known before, broke new ground in significant respects, and included the first thorough bibliography of Conring's writings, as well as surveys of his published and unpublished correspondence. That made it possible for me to go straight to the issues without having to carry out preliminary studies.

The first specific subject I wanted to investigate was Conring's concept of history. It was an obvious choice. Advancing critical methods for authenticating ancient and medieval documents was one of Conring's chief claims to fame. He published more than one work explicitly designated as 'historical' investigations. He was the first to point out that Roman law had come to be considered binding in Germany because German students had been going to Italy for centuries to study at the best schools of law, where they learned Roman law, of course, and from where they returned to practice the law that they had studied. He drove the last nail into the coffin of the belief that Roman law was valid in Germany because its validity was universal. This use of history made for a major difference between him and Durant. I wanted to grasp that difference.

It was easy enough to make a rapid start. Conring had stated his ideas about the study of history early in his career. He did so in the preface to an edition of Tacitus's *Germania* he published in 1635, when he was twenty-nine. He republished the same preface in 1652, and once again in 1678, three years before he died, making a point of stressing that he had not revised it because he still believed what he had written in his youth. That made it a reliable piece of information about what Conring had in mind when he said 'history.'

What I found was that his concept of history differed by a considerable margin from what we mean when we say 'history' today. What we mean, roughly speaking, is either the past or an account of the past. What he meant was a record of purely empirical information. History was data. It was not a form of knowledge properly speaking. Knowledge—what Conring called *scientia*—required two ingredients: empirical observations and general laws and principles or, as he put it, "common laws and universal precepts," with which to explain the observations. History was only one of those two ingredients, and it did not concern itself exclusively with the affairs of human beings. It recorded everything the senses had perceived and only what the senses had perceived,

30 Herberger and Stolleis, *Hermann Conring* (1981); Stolleis, ed., *Hermann Conring* (1983).

in nature no less than in human affairs. History was the empirical foundation of every art and science that had an empirical foundation: natural history was the foundation of natural philosophy, heavenly history of astronomy, political history of political science, medical history of medicine, and so on. Mathematics, logic, and metaphysics had no empirical foundation, and thus no history; all other forms of knowledge did.

Conring's concept of history was thus both wider than ours (because it included other areas of knowledge) and narrower (because it was not a form of knowledge strictly speaking). That does not mean that Conring never used 'history' in order to refer to knowledge of the human past. On the contrary, that is precisely how he usually did use the term. It rather means that he used 'history' to designate real knowledge of the human past only when he did not need to draw attention to the distinction between a record of purely empirical observations and such knowledge. Strictly speaking, only the former was 'history': the latter was not simply 'history,' but 'historical science' (*historica scientia*).

That made for a fundamental difference to William Durant the Younger. Durant had treated the writings of antiquity as authorities conveying true knowledge about the government of state and church. The problem was not that these authorities could not be trusted. The problem was that they had fallen out of use. Conring, by contrast, did not trust these authorities at all. He treated them as evidence. They needed to be critically weighed and judged. He knew perfectly well how much evidence consisted of writings that did not merely record empirical observations, but also claimed to convey real knowledge and commanded great authority. He founded much of his thinking on such writings, particularly those of Aristotle. But he did not do so because of their authority. When he described the principles of knowledge in his inaugural address as professor of natural philosophy, he stressed that Aristotle himself had placed the truth above the authority of Plato. Bowing to the authority of Aristotle was a poor way of showing one's respect for him. A better way was to submit his writings to the same critical judgment with which Aristotle himself had approached the evidence. Knowledge, Conring maintained, was never based on authority: knowledge was based on truth. Conring, to put it bluntly, was no historian at all—let alone a reformer like Durant: he was a scientist.[31]

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31 It may be worth noting the similarity of Conring's account of history to Hempel, "Function of General Laws," which kept provoking debate until Kuhn, *Structure of Scientific Revolutions*, changed the terms of the debate for good.

From Helmstedt via Mainz to Paris: Hermann Conring and Hugues de Lionne

That is one reason why Conring's designation as "the founder of German legal history" does no justice to his place in time. What he called 'history' was nothing anyone could possibly have 'founded.' 'History' could only be recorded, and what he called 'science' was by his own account something that did not have to be founded because it had been founded long ago, by Aristotle for example. As far as Conring was concerned, he founded nothing whatever. He merely made a point of practicing true and tried principles of science in areas of knowledge that he believed to have been disfigured by ignorance, hate, and superstition. His accomplishment was never to relax the discipline required to withstand such enemies, and never to forget the difference between mere words and the reality of things, *verba* and *res*. What counted, he liked to insist, was not the words. What counted was the things, and he was confident there was just one way to grasp the things: that way was science.

Another objection to calling Conring "founder of German legal history" is that it makes him sound too much like nineteenth-century nationalists. Doubtless there are similarities. He wrote in praise of the German nation and hoped for its political unification, sometimes in terms that sound strikingly nationalistic. But in his times those terms had not yet risen to the dominance they won in the nineteenth century. They represented only one of many different commitments among which those to science, peace, and natural law ranked higher. The pursuit of science, peace, and natural law gave Conring every right to act in ways that had little to do with loyalty to Germany. But that was difficult to understand for historians who wanted to measure Conring's significance by the degree of his enthusiasm for Germany. The very same historians who praised him for having founded German legal history, precisely because they praised him in those terms, were therefore sorely tempted to impugn his national credentials and charge him with dishonor whenever his behavior did not match the role they wanted to assign to him.

That bothered me. I thought that if there was dishonor, it lay in treating Conring in terms that ruled out the possibility of self-defense because they could not be rebutted without conceding the legitimacy of those terms—along the line of questions like 'Did you beat your wife today?' I knew of course that things had changed since the nineteenth century. After World War II historians had become more careful about charging Conring with dishonor. Their predecessors, however, had so effectively obscured the difference between the kind of Germany that Conring had imagined in the seventeenth century and the empire that Bismarck had founded in 1871 that it was difficult to recognize

the sense in which the charges of dishonor had always been illegitimate, no matter that historians had stopped repeating them.

The simplest road to clarity, I thought, would be to focus squarely on the subject that nineteenth-century historians had found to be most embarrassing: the services Conring had rendered to princes who were unlikely to have had Germany's best interests at heart. The most important case in point, of course, was that of King Louis XIV of France. In 1660 Conring approached Louis XIV's foreign minister Hugues de Lionne in hopes of winning his patronage. One year later he dedicated his commentary on Machiavelli's *Prince* to Lionne, and for more than ten years thereafter he maintained friendly and lucrative relations with the court of Versailles, including no less a figure than Colbert, to whom he dedicated the second edition of his book on hermetic medicine in 1669. His chief reward for offering his counsel consisted of an annual pension from 1664 to 1673. Patronage was what he wanted, and patronage was what he got.

One can imagine how difficult it must have been for patriotic German historians writing after the founding of the German empire in 1871 to have to admit that Conring had taken payment from the very nation that Germany had just defeated in a war of national unification. But there is nothing wrong with getting paid. Conring, like most scholars in the Republic of Letters, depended for his sustenance on the support of patrons in ways not very different from those in which scholars, artists, and scientists today depend for theirs on public and private funds. Of course he was getting paid, but the question was: For what did he get paid, and why should he not have been paid by Louis XIV?

A thorough answer to that question would have required a thorough study of the differences between Germany in 1648 and Germany in 1871. That would have taken me too far afield. So I limited myself to looking at a memorandum that Conring wrote for France in 1670. It caught my eye because it gave a strong endorsement to France's leadership in Europe. Its central thesis was that it made little sense for France to invest in military power and engage in foreign wars without laying reliable foundations at home. Real power, Conring maintained, depended on the ability to tax, which depended on the wealth of the populace, which depended on the vitality of commerce. The best thing France could do to increase its power was to improve its commerce, and the most obvious way to do just that was to monopolize Mediterranean trade. It followed that France ought to raise capital, possibly in the form of a national merchant company; maintain a navy with which to defend its Mediterranean coast; and enter into friendly relations with the Ottomans and the pirates of Barbary.

More interesting were the reasons that Conring gave to justify this advice. He did not think of France in isolation, but thought of it in the context of Europe as a whole. From his perspective religious war no longer posed the most important threat to peace. The treaties of Westphalia had seen to that. Now peace in Europe was threatened by the ruthlessness with which the English and the Dutch placed the pursuit of profit ahead of natural law, and the success with which they were converting profit into military power. The English and the Dutch were putting the rest of Europe at risk of falling victim to the despotism of pure greed. Only France was powerful enough to stop that despotism in its tracks, provided that France did not squander its resources on military expeditions bound to be fruitless or, worse, drive the Dutch and English into each other's arms. For Conring France was a potential ally in the cause of saving Europe from government by greed. He may well have been wrong in that assessment. But that hardly made him a traitor. It shows rather how far he looked beyond the borders of Germany in order to make up his mind about contemporary politics, and how happily his pension from Versailles went hand in hand with the good conscience of having placed his knowledge of 'statistics' in service, not just to France, but to the common European good.

A Question of Right: Hermann Conring's New Discourse on the Roman-German Emperor

Now I knew what Conring was not: neither a plain historian nor a German in the nineteenth-century sense. That left the question what he was. What did it mean for him to turn from medicine to history and politics? What did it mean to treat the past as a subject of science? I looked for answers to those questions in his *New Discourse on the Roman-German Emperor*. Printed in 1642, the *New Discourse* seemed to be the first real book he published under his own name. All of his earlier writings had been mere academic exercises, works by other authors he merely edited, prefaces he wrote for these editions, or set pieces like his inaugural lecture as professor of natural philosophy.

The *New Discourse* was more revealing. It turned to history for answers to questions about the standing of the German state. It used loaded terms—*imperium, regnum, res publica, summus magistratus*—that were evidently part and parcel of those "common laws and universal precepts" Conring considered to be constitutive of historical science. Though it was only one book among many, and a short one at that, it went straight to the conceptual core of Conring's thinking. It seemed a reasonable choice for the experiment I had been planning.

The outcome of that experiment was prefigured by my very first reaction to reading the *New Discourse*: I was surprised by the delight I felt in reading it. I had never felt anything like that in reading Durant's *Tractatus*. It was like meeting an old friend for the first time in many years: strikingly familiar and strikingly different, too. Familiar, because it was almost the same as what I had been taught in school. Different, because in school it had consisted of a list of names, dates, and events—Caesar's conquest of Gaul, Germanic tribes in ancient forests, Visigoths, Ostrogoths, Charlemagne, feudalism, Henry IV battling the papacy, Frederick Barbarossa also battling the papacy, and so on—whose purpose I had never managed to figure out. What was the meaning of that list? Why did I have to make its acquaintance? I was told that this was what had happened and that it was my heritage. All well and good. But for the life of me I did not understand why that made it worth knowing. It seemed to be a lot of true but needless information.

The *New Discourse* was rather more exciting. It consisted of a brief history of the extent of the Roman Empire since antiquity and its relationship to the German people. Much of this history resembled what I had learned in school. But this time the information came with a reason that made sense. The reason was to prove that the Roman Emperor had no right to rule Germany, let alone the world.

That made it clear what Conring meant when he insisted on the need for general laws and principles to grasp the meaning of historical observations. The general law was that humanity consists of different peoples and that each people has a right to rule itself by forming its own state (*res publica*). The historical observations proved that the Roman Emperor had never ruled the world; that for all practical purposes the Roman Empire was long gone; and that the German people were being ruled by someone who violated natural law by claiming the right to rule the entire world because he was Roman Emperor. The *New Discourse* was not intended to enlighten the German people about their heritage, but to cure them of a historical delusion. It dealt with a question of right. It was a political, constitutional, and legal brief for the sovereignty of the German state. The brief was needed because the so-called Roman Emperor was at that very moment, in 1642, still waging war on Germany in order to enforce his claims. Those claims, Conring believed, were what had caused the Thirty Years War. They had to be refuted for the sake of peace, and they could only be refuted with accurate historical documentation.

This understanding of Germany's condition accounted for Conring's turn from medicine to history. His work in medicine and history was fueled by one and the same desire and carried out with the same means. The desire was to improve the lot of human beings, and the means was science. The difference

was that medicine helped individual human beings with troubles afflicting their natural bodies, while history helped them with troubles afflicting the body politic. The 'body politic' was not a metaphor, it was a veritable body.[32] It suffered from real diseases, and it needed real medicine. History was that medicine. How badly the medicine of history was needed to heal the German body politic was something Conring had not known when he began to study medicine in the Netherlands. He learned it only in conversation with his friend and mentor Jacob Lampadius (1593–1649) when he returned from Leiden in 1632. But once he had learned it, he turned to history for the same fundamental reasons and with the same passion with which he practiced medicine throughout his life.

No wonder I had been bored by the history I had been taught in school. The disease it had been meant to cure was gone and the reason for telling it had been forgotten. It seemed to have been written by no one, nowhere, for no purpose. Whatever may have been the medicine that Germany needed in the middle of the twentieth century, it was not the medicine Conring had given to Germany three hundred years before. No wonder that reading the *New Discourse* was a delight. Conring knew what he was doing and why he was doing it. He was practicing science in order to put an end to violence and superstition. The question was: How well did science do the job?

The answer is that science did not do the job as well as Conring maintained. What I knew about the Middle Ages focused my attention on a clue that I might otherwise have overlooked. The clue consisted of the haughty manner in which he dismissed Bartolus of Sassoferrato for having claimed that the Roman Emperor was lord of the world. That made me suspicious. I knew that Bartolus was one of the most level-headed and learned of medieval thinkers. He was widely recognized as the guiding intellectual light of the *mos italicus*, one of two main schools of legal thought in late medieval and early modern Europe. He was not in the habit of making unfounded claims. That Conring ridiculed his claims was prima facie evidence that something was amiss.

What was amiss was fundamental: the case of which Conring disposed was not a case that Bartolus had ever made. Bartolus was well aware how limited the power of the emperor was in France, in England, and in the self-governing Italian cities, not to mention the world outside Europe. He knew the facts, he mentioned them explicitly. But they did not affect his case. His case rested on different facts, namely, the statements of Roman law. Conring treated those

32 In spite of the great differences between Conring and Hobbes, one cannot help but think of the famous frontispiece to Hobbes's *Leviathan*, depicting the ruler's artificial body as composed of the natural bodies of human beings.

statements as mere words pronouncing the laws of just one ancient people, as was his right. But it was not his right to act as though Bartolus ought to have treated them the same. Bartolus was just as much within his rights to treat them as something different from mere words, namely, standards of justice for the whole world, which is precisely what he did, along with his contemporaries, including men like William Durant the Younger.

The point at issue between Conring and Bartolus was therefore not a question that could be answered simply by pointing to certain facts. The point at issue was the question of just what ought to be counted as a fact. That question demanded a different kind of attention to the meaning of terms like 'world,' 'rule,' 'people,' 'right,' 'law,' and 'lord' than Conring was giving them. On Bartolus's understanding of those terms, the emperor was "truly lord of the world" (*dominus totius mundi vere*). His lack of power to enforce his will was not on point. On Conring's understanding of the same terms, that made no sense. But Conring never addressed the difference in dispute. He kept insisting that words and things are not to be confused. But he took it for granted that no one could dispute his understanding of what counted as fact, what it meant to rule, and what it meant to rule the world. It seemed obvious to him that the Romans were no different from any other people and that only someone with the ability to enforce his will in every part of the world deserved to be called lord of the world. But not once did he explain just why the right that Bartolus attributed to the emperor ought to be counted as a matter of mere words. He begged the most important question.

Hermann Conring and the Republic of Letters

That was an exciting discovery. It revealed that Conring did something similar to what Durant had done: he refused to countenance a possibility that he himself had raised. Like William Durant the Younger, he was confronted by a tension between the meaning he wanted his writing to have and the meaning it had in fact. The meaning he wanted it to have was that of knowledge—pure knowledge, a kind of knowledge that was founded solely on facts, secured by science, and needed no support apart from the support it got from being true. This was what he kept trying to drive home with his assertions that Bartolus ignored the facts. But when the facts did not speak for themselves, he did not hesitate to speak for them. Instead of responding to the case that Bartolus had made, he brusquely stopped it from even being heard. He acted as though the answer were a forgone conclusion, so obvious that any child would know. That gave a different meaning to his writing: against his will he proved his knowledge not to be pure at all, but to embody his refusal to engage with Bartolus in open debate about the differences dividing them over the meaning of the terms they used. His case depended on the repression of a doubt.

That cast Conring's work in a new light. Precisely by promoting the scientific study of the past he silenced whatever opposition came from anyone whose erudition conflicted with his own. He may well have been an honest citizen in the Republic of Letters. But like other citizens in that Republic he did not merely render his services to scholarship and science. Precisely by advancing scholarship and science he served the state as well. He cast a veil over the reasons on which imperial and papal opponents of territorial sovereignty had based their claims to universal authority. He did nothing more effectively than wipe the slate clean of any claims the past might otherwise have exercised upon the present and he concealed what he was doing from everyone, himself included. The injury he did to Bartolus was as completely hidden by his scholarship as the criteria on which he based his judgment were hidden by the facts they were supposed to justify. That may well be the deepest reasons why arguments like his proved to be irresistible.

Conring's *New Discourse* thus constitutes a tiny clue to a large danger buried in the foundations on which Europe was staking its future at that time. Like Conring, Europe had placed its bet on scholarship and science. Like Conring, Europe refused to countenance the questions raised by that bet and made its self-assurance depend on the repression of a doubt. The doubt was well understood. It had been advertised by the revival of Pyrrhonic skepticism during the sixteenth century and raised to new heights by Montaigne. Descartes had given it the memorable shape of a malicious demon inspiring cosmic fears of nothingness.[33] But once Descartes had found what he regarded as the indubitable truth, demonic doubts and fears were buried deep in the foundations on which Europe was building its dominance over the world. They seemed to have been superseded by peace and progress in the name of reason, liberty, and civilization, nowhere more blatantly than in the works of Hegel. It took a while before Europe woke up to the realization that the terms with which it had sought to justify itself were not at all self-evident. When it did wake up, it could not tell how to defend itself against the doubts and fears it had learned only to repress.

The case of Hermann Conring thus resembles the case of William Durant the Younger in one important respect: his writings shed light on history far beyond the limits of his own life. In another respect their cases are strikingly different: they are placed at something like opposite points in time. The foundations on which Durant rested his case were old when he was making it. His trouble was that the possibility he did not want to face was just about to turn into reality. Reality was forced on his attention by the same papacy he had been hoping to constrain, at the same council to which he submitted his proposals for reform.

33 Descartes, "Meditations," 15, 18.

He lived to see his fate unfold. By contrast, the foundations on which Conring was building his case were still quite new when he was building it. Enthusiasm for the ability of those foundations to put an end to the upheaval that Europe had been suffering for more than a century was still so lively at the time that it was easy to overlook whatever doubts and fears they hid. Conring did not live to see his fate unfold. Durant's misfortune was Conring's good luck. Durant lived at the end, and Conring at the beginning, of a historical development leading from the repression of doubt and fear to their return.

Experiment Over

It took a while for me to realize that my account of Conring's case had dangerous implications for the validity of mine. When I was reading Conring's preface to Tacitus, I had been captivated by the differences between what Conring meant by 'history' and what we mean by 'history' today. Those differences had seemed to justify a sharp distinction between the 'science' Conring believed to practice and our kind of 'history.' But that distinction was something of an optical illusion, due to the great progress the natural sciences had made in the nineteenth and twentieth centuries. History had never been expected to extend the boundaries of knowledge as far as that. History's standing as a science rested on a simple foundation: the possibility of subjecting our knowledge of the past to a critical test. The test consisted of the analysis of the surviving evidence. The value of that test seems obvious from hindsight. But at the time it amounted to a major discovery. It gave historians the power to expose as myth and legend what had previously passed for the unquestionable truth, even the word of God himself. The progress of the natural sciences did nothing to reverse that discovery. Whatever else historians may nowadays believe, they still base their claims on evidence and they continue to regard it as a myth that the Roman Emperor rules the world, or has the right to rule the world, or ever did so in the past. To that extent historians today, like Conring in his time, have every right to say that history is science, even if they no longer call it science as confidently as J. B. Bury did in 1902.[34]

That was another reason for the delight I felt in reading the *New Discourse*. It flattered my vanity as a historian. But for that very reason it also undermined my case. I had been trying to discover a criterion with which to judge the significance of the distinction between the Middle Ages and modernity. I had thought that comparing Conring with Durant would tell me whether Durant's refusal to face the meaning of his work was merely a matter of the conditions of his time or something else. When I realized that Conring refused to face the

34 "History is a science, no less and no more." Quoted from Moore, "World History," 942.

meaning of his work in the same way, but under conditions that were almost directly opposite, I thought that my experiment had worked. It seemed that I had found a constant that was not changed by the transition from medieval to modern times. It seemed that now I merely needed to trace the history of that constant from Durant to Conring in order to overturn the tyranny of the distinction between the Middle Ages and modernity.

But I had missed a crucial point. I stood with Conring on the same side of the divide between the Middle Ages and modernity. We were allies in the cause he had directed against Bartolus and people like my old friend William Durant the Younger. That raised an obvious question: If Conring's methods were like mine, why would mine yield more reliable results than his? If Conring's practice of history was flawed because it repressed a fundamental doubt, what gave me the right to think that mine did not? If Conring was not doing justice to Bartolus, what gave me the right to claim I was?

The answer was that nothing did. If Conring was dealing with a question of, not fact, but right, then so was I. If my methods were the same as Conring's, the results that I obtained from them were just as compromised as those he had obtained. The difference was merely whom each of us was trying to refute. He was refuting Bartolus; I was refuting Conring—along with those among my fellow historians who had 'failed' to consider the evidence to which I was drawing their attention, just as Conring had 'failed' to consider the terms in which Bartolus had framed his case. If I was defending Bartolus from Conring's attacks, should I not also have been defending Conring and my fellow historians from mine? Should I perhaps not even have defended myself against myself?

My experiment had worked all right. But not as I had thought. So far from giving me criteria with which to escape from the tyranny of the distinction between 'medieval' and 'modern' times, it had established that I was complicit in the tyranny. My historical investigation of Conring's historical investigation had led into a vicious circle. The question was no longer merely why Conring and Durant had failed to face the meaning of their work. The question was whether I could face the meaning of my own. Did I have any reason to believe my work to be immune to the distinction between the meaning we want our words to have and the meaning they have in fact? The answer was obvious. My work was subject to the same kind of doubt as Conring's and Durant's. My experiment had worked all right, but only because it had exploded.

Learning from Wittgenstein

As you might well imagine, that made me wonder about the wisdom of having cast my lot with history. For several years, while carrying on with my

professional responsibilities, I looked in all sorts of directions for clues how to get out of my quandary. I went back to areas of knowledge I had once actively explored, but to which I had stopped paying attention since I had received my Ph.D. and the requirements of working as a historian had made me vulnerable to the dangers of what the French call *déformation professionelle*. I read whatever came to hand: literature, psychology, religion, anthropology, linguistics, sociology, history, theory, critical theory, and chaos theory; ancients, medievals, and moderns; primary sources and secondary literature; poetry and prose. I revisited Kant, dabbled in Hegel and Nietzsche, spent much time with Heidegger, and followed up by dipping into writers like Barthes, Foucault, Derrida, Jameson, Rorty, Lyotard, Taylor, Geertz, Benjamin, Arendt, Habermas, Strauss, Ricoeur, Freud, Jung, and Kierkegaard. I even read some mathematics and technically undemanding introductions to quantum mechanics; I read a lot.

But I read nothing deeply. I found a great deal that was rewarding and a great deal that did me no good at all. But I found nothing anywhere that I had never heard before—nothing of which I had the slightest hope that it would have been able to withstand the explosion in my experiment. No matter where I looked, no matter how different each book seemed from the next at first, sooner or later I ran into one of two things: either the very same distinction between words and things that had exploded in my face, or proposals for doing away with it that were confused (because they kept asserting that one thing is definitely true about reality, namely, that nothing is definitely true about reality) or dangerous (because they made a virtue of irrationality).

Except when I read Wittgenstein. I had encountered Wittgenstein before, during the year I spent in Heidelberg before arriving in the United States in 1975. I had been prompted by Ernst Tugendhat in a seminar he taught on Aristotle's *Metaphysics* and a lecture course on the philosophy of language. Tugendhat had made a compelling case that Wittgenstein had changed philosophy in ways that did not merely cast the philosophical tradition in a new light, but gave it new life. I had read the *Tractatus logico-philosophicus* and the *Philosophical Investigations* in hopes of learning about that new life. I had been left with the distinct impression that there was something important going on, but I could not tell what it was, not on my own. My failure to make sense of what I read had been intensely irritating, but over time the irritation had gradually diminished until it was a vague and distant memory of some unfinished business.

When I returned to reading Wittgenstein in the mid-1990s, it was as though I had never read him before. This time I managed to follow his terse sentences with understanding, slowly at first, then with increasing speed and

confidence.[35] It quickly dawned on me that I was entering a realm of thought that no one else had shown to me before. I had expected Wittgenstein to defy Hume, Kant, and Descartes. But I had thought he would defy them on lines like those pursued by Nietzsche, Heidegger, Foucault, or Derrida, if not the lines that had been recommended by logical positivists. I had not expected to find something completely different and far more radical than that. For the first time, I was not disappointed.

Wittgenstein made none of the false moves with which I had become so thoroughly familiar. He made every form of criticism that I had met before seem feeble, no matter how radical it had once looked to me. He challenged not only Hume, Kant, and Descartes, but also their followers, critics, predecessors, and predecessors' critics, all the way back to the Pre-Socratics. Philosophers had seemed to be divided by fundamental disagreements. Wittgenstein showed that they did not disagree with one another nearly as fundamentally as it had seemed. They turned out to be united in a cause that I had never known existed and could not have imagined without his help.[36] He took no sides with any of the parties. What he kept driving home was that all of the parties were in agreement on the foundations of their case—foundations all the more durable for being well concealed—and that the problems lay, not with their disagreements, however exciting and stridently pronounced, but with their failure to recognize how much they shared. He showed that "idealism, strictly thought out, leads to realism," and "solipsism, strictly followed through, collapses into pure realism."[37] He offered freedom from questions that had been keeping us

35 The single most important piece of advice to help me over the obstacle I had not managed to scale some twenty years earlier was James Conant's recommendation that I read G. P. Baker and P. M. S. Hacker's *Analytical Commentary on the Philosophical Investigations*. Once I had read those volumes, I knew how to find my way to "the new Wittgenstein." Cf. Crary and Read, eds., *New Wittgenstein*.

36 Compare, for example, Finkelstein, "Wittgenstein and Platonism," with Stone, "Wittgenstein on Deconstruction."

37 "I am alluding here to a formulation of Wittgenstein's regarding what is involved in philosophical elucidation that surfaces in passages such as the following: '[I]dealism, strictly thought out [streng durchgedacht], leads to realism.' (NB p. 85; I have emended the translation)—and: '[S]olipsism, strictly followed through [streng durchgeführt], collapses into pure realism.' (TLP 5.64; I have emended the translation)." Conant, "Wittgenstein's Later Criticism," 175n5, with reference to Wittgenstein, *Notebooks*, 85, and Wittgenstein, *Tractatus logico-philosophicus*, trans. Ogden and Ramsey, 90; brackets supplied by Conant.

in the grip of metaphysics since antiquity: What is being? What is consciousness? What is the relationship between the subject and the object?[38]

Contrary to the familiar stereotype according to which Wittgenstein changed his mind after he had written the *Tractatus logico-philosophicus* and developed a completely different philosophy in the *Philosophical Investigations*, I found that the *Tractatus logico-philosophicus* and the *Philosophical Investigations* were aimed at the same target and written in the same spirit.[39] Contrary to opinions held almost universally, he never tried to determine the boundaries of sense, much less the boundaries of thought or language. What he did try to do was just the opposite: to show that trying to determine the boundaries of sense leads only to nonsense—not meaningful nonsense hinting at hidden truths, as many would like to have it, but plain nonsense, making no sense at all and having no meaning whatsoever. He traced the unending proliferation of such nonsense back to well-nigh irresistible temptations so deeply embedded in our language as to keep driving us to meaninglessness and worse, and he described the essence of those temptations as clearly as one could possibly desire:

> We're tempted to say that our way of speaking does not describe the facts as they really are. As if, for example, the proposition 'he has pains' could be false in some other way than by that man's *not* having pains. As if the form of expression were saying something false, even when the proposition *faute de mieux* asserted something true. For *this* is what disputes between idealists, solipsists, and realists look like. The one party attacks the normal form of expression as if they were attacking an assertion; the others defend it, as if they were stating facts recognized by every reasonable human being.[40]

That was diametrically opposed to virtually everything that I had read under the rubric of the 'linguistic turn.' It made plain nonsense of the idea that there is something wrong with the forms of our expressions or (to use a more famil-

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38 I first learned to appreciate the extent to which awareness of these questions illuminates both the history of the philosophical tradition and its transformation by Wittgenstein from Tugendhat, *Vorlesungen*, and Tugendhat, *Selbstbewusstsein.*

39 The reasons why Cora Diamond and James Conant believe that the *Philosophical Investigations* continue the very same kind of work that Wittgenstein began in the *Tractatus logico-philosophicus* seem thoroughly convincing to me; see Diamond, "Throwing Away"; Diamond, *Realistic Spirit*; Conant, "Throwing Away"; Conant, "Method"; and Crary and Read, eds., *New Wittgenstein*.

40 *PI* § 402.

iar way of stating the same idea) that our representations of reality are never adequate to the reality itself. It made equal nonsense of the pellucid clarity philosophers since Plato had made a condition of real knowledge—as if there were something wrong with the knowledge we actually have. It could withstand the most combative forms of skepticism and prevail over the doubts Descartes had battled. It showed that the familiar distinctions between 'physis' and 'nomos,' 'nature' and 'culture,' 'mind' and 'matter,' 'self' and 'other' lay traps for our thinking. It put paid to the claims of sophists and their enemies alike, and it established a firm position on different intellectual terrain. Wittgenstein offered a new and thoroughly convincing perspective on the relationship between truth and meaning, not least by attending with great care to the difference between what 'I mean' and what 'it means'—precisely the difference with which I had now been confronted twice without quite knowing what to call or make of it. That changed my mind about the study of the past.

Author and Authenticity in Conring's New Discourse on the Roman-German Emperor: *A Seventeenth-Century Case Study*

But that took years and led beyond the studies in this volume. For the time being I kept going on down the road on which I had been travelling all along while looking left and right in hopes of finding a way out of the no man's land in which I seemed so unexpectedly to have arrived. An obvious question lay at hand. I had examined the *New Discourse*, and what I found had led me to question whether my methods did more justice to Bartolus than Conring's methods had. But I had not yet tested the degree to which my methods were doing justice to Conring himself. The *New Discourse* was only a single piece of evidence among the several hundred titles on the list of his published writings alone. What was the standing of that evidence? What gave me the right to consider it sufficient for getting hold of Conring's mind?

Those questions led to a different discovery. At first sight the *New Discourse* appeared to be a book that Conring had published in 1642. But that was an erroneous impression created by an unknown printer, probably in the Netherlands, who had given the *New Discourse* a fictitious title and omitted crucial details about its origin. In fact it had been published without Conring's knowledge and against his will. As soon as he found out about its publication, he disavowed his authorship in public and emphatic terms, complaining about the damage done to his reputation by what he regarded as the greed with which the printer had attributed this "primitive suppositious child" to his good name and given it an "insolent" title. What he did not say was that this "primitive suppositious child" was virtually identical to a dissertation defended by one of his students in the preceding year. He had approved that dissertation and, what is more,

reprinted it himself late in his life in a collection of his most important studies on the Holy Roman Empire, albeit with small changes to a few sentences that made a big difference to their meaning. He also went on to write a longer and more detailed book *On the Roman Empire of the Germans* in order to set the record straight. That book was published in 1644, only two years after the *New Discourse*. Conring described it as an authoritative statement of what he really thought about the issues the *New Discourse* had treated in such a "primitive" way. But, like the *New Discourse*, that authoritative statement was also first presented to the public in the form of a dissertation by one of Conring's students. More to the point, its substance differed not nearly as sharply from the *New Discourse* as Conring claimed.

It took some time to figure out exactly what had happened here. Nothing was what it seemed at first. Part of the reason was that in those days a dissertation was never simply written by a student and approved by a professor. It could be written by the professor himself. It could be based on notes the student had taken of the professor's lectures. It could be written by the student on the instruction of the professor. It could be an amalgam, co-written by the professor and the student. Only one thing was clear: a dissertation needed to be defended in a public examination before it could be approved.

It followed that the dissertations 'written' by Conring's students are by no means easy to distinguish from Conring's 'own' books. Moreover, the 'books' that Conring wrote went commonly through several stages of development, from lectures via dissertations to finished books that were reissued and revised more than just once. These lectures, dissertations, and books made the same points in different ways, and different points in the same ways, and sometimes left no doubt that Conring was biting his tongue. In short, the lines that we believe to lead from a definite set of words to the definite thoughts of a definite author could never be completely disentangled, not because they were too complicated, but because the words, the thoughts, and the author were never 'definite' in the first place.

As best I could tell after comparing the *New Discourse* with every other writing on the same subject by Conring or one of his students defending a dissertation under his guidance, it was precisely the *New Discourse* that seemed to give the most reliable account of his ideas. The book he advertised as an authoritative statement of what he really thought seemed to have been deliberately written in order to conceal how well the *New Discourse* did in fact convey his own ideas. It seemed he disavowed his own ideas only because they were controversial and he had not expected them to be circulated in public under his name against his will. Once they had escaped the confines of academic life

in Helmstedt, they could be turned against his reputation and authority. He tried to evade the danger by claiming that he was not really their author and not really to be held responsible for them, but none of his attempts to exercise authorial control ever quite worked. The *New Discourse* kept circulating and was reissued in yet another pirated edition. After much time had passed Conring resigned himself to its success. He never explicitly accepted responsibility for it. But he republished the dissertation of which the *New Discourse* was a straightforward copy, and even recommended it as an effective summary of his ideas.

In one sense that was merely another illustration of the significance of the distinction between what 'I mean' and what 'it means.' Doubt about the difference between the meaning Conring attributed to Bartolus and what Bartolus himself had meant was not the only doubt that Conring repressed. A similar doubt went straight to the heart of his own writing. It arose from the difference between the meaning he wanted his words to have and the meaning they had in contexts other than those of which he was in charge. His trouble was that he was forced to turn against a case that he himself had made. The anger he unleashed on the *New Discourse* speaks to the nature of that trouble. It was of the same kind as the anger he had unleashed on Bartolus, except that in this instance he had to aim it at himself.

In another sense, the doubt that had thus fallen on Conring's relationship to his ideas lent welcome confirmation to my understanding of the relationship between Conring's historical investigation of Bartolus and my own historical investigation of Conring's historical investigation. That relationship was deeply problematic. Subjecting Conring's writings to critical historical examination according to the standards on which the historical profession required me to build my case had proved that such an examination could not be carried out without confounding those very standards. The more firmly I put them into effect in order to determine precisely what Conring meant, the more convincingly they proved his meaning to lie in two distinct dimensions. In one dimension, it was a straightforward function of his intention. In the other, it did not merely vary independently from his intention, but veritably foiled his purpose. This was not at all because there was no evidence with which to document his intention, much less because it happened to concern a case of intellectual misappropriation. The evidence was abundant, and the misappropriation merely made the difference between the two dimensions impossible to overlook. It was because the difference between 'I mean' and 'it means' is irreducible. It is constitutive of meaning anything at all. It guarantees that meaning is never singular, but always plural, open-ended, extending

from the original distinction between 'I mean' and 'it means' in the direction of countless other possibilities, any one of which may or may not be given definite expression. It cannot be eliminated except at the price of eliminating meaning altogether. Conring meant nothing whatsoever with the precision the conscientious application of the standards of the historical profession has been supposed to ascertain. That makes the standards dubious.

The Limits of History

At this point I had the makings of a book. I called it *The Limits of History* because it dealt with the limits of the knowledge at which Conring and his like had aimed. It did of course still deal with Conring, and at some length with Bartolus as well. It laid out just what it was about Conring's critique of Bartolus that did not stand up to scrutiny. It traced the paths on which Conring's words could and could not be followed to his ideas. It even included a sketch of Conring's life and works that was not really required by my argument, which I added at the last moment only because it would have seemed foolish not to do so for an author so little known to English-speaking readers. But those were merely the means to an end. The end consisted of an argument in which Conring appeared not as an individual but as a type. It focused on the form of history that was established by those early modern humanists of whom Conring was only one very late example, and that we still practice nowadays: history founded on the critical analysis of evidence.

In the terms I have at my disposal, not at that time, but now, I would sum up the argument in four main points. First, the study of history is itself a part of history. It does not give us any means with which to take ourselves out of the history we study. It neither transports us into the past nor does it restore the past to our presence. It especially does not relieve us of responsibility for the terms to which we commit ourselves in saying whatever we may have to say, no matter how thoroughly our terms may be embedded in our particular ways of life, no matter how sharply they may differ from the terms used by the people whose history we study. It anchors us in the specific plot in time and space we happen to occupy today. In this sense the study of history amounts to something I can only call anachronistic self-assertion.

Second, it is misguided to believe that anachronistic self-assertion conflicts with truth and knowledge on the grounds that it must lead to a vicious circle—the kind of circle that seems to consist of a closed system of self-referential signs and symbols and that apparently makes it impossible for us to grasp reality or other minds, condemning us instead to live our lives in halls of mirrors where we can only see our own reflections, or echo chambers in which we can only

hear ourselves. That circle agitates a great many theorists today.[41] But the circle making the study of history a part of history itself is no more self-referential than the circle in which children learn how to speak from parents.[42] It is more like the circle by which orthography determines the spelling of 'orthography.'[43] It places no limits on our ability to learn the truth about the past at all. To the contrary, it states the conditions that make such knowledge possible.

No one can very well say anything about the past (or for that matter anything else) unless they say it in whatever language they happen to be speaking here and now. That is no deep insight into the laws of truth. It is a truism, as obvious and self-evident as only truisms can be. Truth is a quality of things we say, statements we make, assertions we maintain. Truth is obviously not the only quality our statements can have. Our statements can be false, meaningless, funny, stupid, pointed, good-natured, vague, enlightening, and many other things besides. But they can be none of those things if they are never made. If no one does the telling, no truth is being told. To doubt the truth of an assertion merely because it has been expressed in words is simply meaningless. How else is it supposed to be expressed? Truth goes happily hand in hand

41 It is also typically considered to constitute the main lesson taught by Wittgenstein's *Tractatus logico-philosophicus*. But that gets the *Tractatus* precisely the wrong way round. See above, p. 48.

42 Wittgenstein put it like this: "Then am I explaining what 'order' and 'rule' mean in terms of 'regularity'? – How do I explain the meaning of 'regular', 'uniform', 'same' to anyone? – I'll explain these words to someone who, say, speaks only French by means of the corresponding French words. But if a person has not yet got the *concepts*, I'll teach him to use the words by means of *examples* and by *exercises*. – And when I do this, I do not communicate less to him than I know myself. In the course of this teaching, I'll show him the same colours, the same lengths, the same shapes; I'll make him find them and produce them; and so on. For example, I'll teach him to continue an ornamental pattern "uniformly" when told to do so. – And also to continue progressions. That is, for example, when given: · ·· ··· to go on: ···· ····· ·····. I do it, he does it after me; and I influence him by expressions of agreement, rejection, expectation, encouragement. I let him go his way, or hold him back; and so on. Imagine witnessing such teaching. None of the words would be explained by means of itself; there would be no logical circle." *PI* § 208. This is one of the most straightforward passages showing how Wittgenstein managed to put a convincing end to the search for synthetic judgments a priori without having to concede that the alternative must consist of logical tautologies.

43 "One might think: if philosophy speaks of the use of the word 'philosophy', there must be a second-order philosophy. But that's not the way it is; it is, rather, like the case of orthography, which deals with the word 'orthography' among others without then being second-order." *PI* § 121.

with anachronistic self-assertion. What places limits on our knowledge is not anachronistic self-assertion but lack of evidence and lack of familiarity with the language in which the evidence is speaking.

Third, although anachronistic self-assertion need not lead anyone into a vicious circle, it most definitely can. It does whenever we rebuke it for its fallibility and replace it with the desire for a kind of knowledge that seems to require no self-assertion because it is not merely true, but purely true beyond all possibility of doubt. Pure truth is not to be confused with plain old truth. The plain old truth is stated in sentences like 'she stayed at home all afternoon,' 'a tune-up for that bike costs ninety dollars,' and 'if you turn right at the first corner and then go up the hill for about a mile, you'll see it on your left, right behind the gas station.' The plain old truth has two outstanding features: one can always ask 'how do you know?' and sometimes it turns out not to be true at all. Hence we can change our minds when we encounter evidence disproving what we believed to be the case, and state the plain old truth in sentences like 'I thought I paid that bill, but I forgot to put the letter in the mail.' Truth in that straightforward sense is easily within our reach. That sense is fundamental.

Pure truth means something else entirely: a kind of truth that cannot be refuted by any evidence because it speaks directly to the reality of things themselves, with absolute objectivity and no admixture of whatever forms of subjectivity the subject imposes on its interpretation of the evidence. It is purely true because its objectivity is absolute. It is independent of anyone's assertions. It is true regardless of anyone who says it is, and will continue to be true at any time in any place. It bears no relationship to any subject, let alone a human being, and it does not require us to take any responsibility for our knowledge here and now in our place and time. It is as far removed from anachronistic self-assertion as here and now is from eternity.

Such knowledge is the figment of a metaphysical imagination so captivated by the distinction between subject and object as to confuse it with a distinction between two different kinds of things—what Descartes called *res cogitans* and *res extensa*. It forgets that 'subject' and 'object' are terms of grammar, and it excludes all considerations of humanity as it exists in space and time. Such knowledge does not exist, not merely because we do not have it or because the means on which we must depend for our knowledge are sadly inadequate to the task of getting it, but because it is inconceivable. Knowledge no one can have, on the fallacious grounds that having it is tantamount to misrepresenting the reality of things, is no knowledge at all, but a chimera wreaking havoc with meaning and understanding. That does place limits on our knowledge. It makes knowledge meaningless and can all too easily become a source of terror.

Fourth, since early modern times historians have been in the grip of that chimera. Their pursuit of the pure truth—what Conring called *absoluta omnibus numeris rerum scientia*—has always gone beyond the task of analyzing evidence. Sometimes it even tempted them to wish for the extinction of their selves, so that the truth about the past could shine forth all the more purely, as Ranke put it in the nineteenth century.[44] It always ended in disappointment with the inadequacy of their knowledge. That did lead historians into a vicious circle. At first they very much enjoyed the ride, because the ride allowed them to establish their own authority by sentencing myths like the universal jurisdiction of the Roman Emperor to meaninglessness. But when the Roman Emperor stepped off his throne for the last time in 1806 and absolute objectivity at last appeared to be within their reach, the meaninglessness began to fall back on to themselves. As soon as history turned out not to be capable of yielding absolute knowledge, they were confronted with a crisis—the crisis of historicism, as it is often called—that shook the foundations of their work. The crisis spawned offspring on the Right, according to which history amounts to the survival of the fittest; offspring on the Left, according to which history is pre-determined by iron laws of historical development; and interminable efforts to distinguish the 'objective' from the 'subjective' ingredients in history—the 'facts' from the 'values,' the 'evidence' from the 'interpretation'—that were supposed to defend historians against their history. But it was never resolved. By now historians often conclude that 'truth' ought to be banished from the vocabulary of the profession, or even be replaced by the assertion that there is no such thing as knowledge of the past at all.[45]

The Limits of History dealt with two instances of this kind of meaninglessness. One instance consists of the seemingly insurmountable divide driven between the evidence and Conring's thought by pressing the evidence to yield pure knowledge. The evidence consists, in part, of Conring's writings. These writings are evidence for Conring's thought. The effect of forcing this evidence to yield pure knowledge is to create the illusion of an unfathomable gulf dividing the evidence from the reality of Conring's thought. The illusion seems to

44 "Ich wünschte mein Selbst gleichsam auszulöschen und nur die Dinge reden, die mächtigen Kräfte erscheinen zu lassen." Quoted from Oexle, "Was ist eine Quelle?", 168.

45 As the current version of the American Historical Association's *Statement on Standards of Professional Conduct*, 5, puts it in describing the "shared values of historians": "*Multiple, conflicting perspectives are among the truths of history*. No single objective or universal account could ever put an end to this endless creative dialogue within and between the past and the present." Emphasis in the original. Note the false choice between a "single objective or universal account" and "this endless creative dialogue within and between the past and present"—as if there were no room for plain old truth between the opposites.

place his thought beyond the limits of all understanding and leaves the historian wondering if there is anything that can be said with confidence about what Conring thought at all—when it ought to be obvious how much there is, only that it does not conform to the requirements imposed by the delusion that knowledge does not qualify as knowledge unless it is pure.

The other instance consists of the seemingly insurmountable divide driven between the Middle Ages and modernity by pressing the evidence to yield pure knowledge of the difference between these periods. The evidence consists, among a great many other things, of differences between the writings of Conring and Bartolus. These differences amount to perfectly valid reasons for distinguishing the Middle Ages from modernity. But they vanish from sight as soon as we try to define them with absolute precision. They cannot but vanish from sight because they consist of differences between the terms to which Conring and Bartolus were committed. Defining such differences with absolute precision is, by definition, the same as eliminating them. Of course they vanish from sight. Once they have been clearly defined, the differences between the Middle Ages and modernity can only be accounted for in terms of logical distinctions—which is not to account for them at all because the differences in question are not logical, but historical. "Only that which has no history is definable."[46] No wonder that historians who try to define the boundary between the Middle Ages and modernity are wondering why something that seems so obvious turns out to be so difficult to fathom.

By now the hunt for absolute objectivity seems to have lost most of its old appeal. What has unhappily not yet lost its appeal is absolute subjectivity. Absolute objectivity is gone from the minds of most respectable historians. Absolute subjectivity is very much alive and well. It has not yet sunk in that absolute subjectivity is merely the mirror image of absolute objectivity, and quite as meaningless.[47] It cannot very well sink in unless we take responsibility for knowledge and stop imagining that knowledge can be had without anachronistic self-assertion.

Political Unity and Religious Diversity: Hermann Conring's Confessional Writings and the Preface to Aristotle's Politics *of 1637*

I returned to Conring's writings one more time after *The Limits of History* was published. I knew that he considered history to be a kind of science, and that he practiced it in order to cure his age of the diseases wrought on the body

46 Nietzsche, *Genealogy of Morals*, 2.13, trans. Kaufmann, 80.

47 Conant, "Subjective Thought," makes the point with great clarity.

politic by ignorance and superstition. What I did not know was how he hoped to distinguish ignorance and superstition from religion.

My first stab at finding an answer was to survey the writings Conring devoted to religious peace and confessional disputes. There is an abundance of such writings, and they leave no doubt about Conring's credentials as a proponent of religious peace, and they testify clearly to his Protestant commitments. But they say very little about the core of his beliefs. They rather leave a powerful impression that Conring preferred to hide his religious face behind a mask like that of Irenaeus Eubulus, the well-meaning but entirely fictitious Catholic irenicist whom he made the supposed author of one of his earliest and most important writings about religious peace.[48] Whoever wants to grasp the core of Conring's religion is better advised to start with writings that lie at what seems to be a distance from matters of religion. Precisely because they do not address religion head on, they reveal Conring's views on religion with greater clarity.

One such writing is the long preface to Aristotle's *Politics* that Conring published in 1637. It is one of the earliest pieces in which he explained what he meant by terms like 'civil prudence,' 'civil wisdom,' or 'civil philosophy' (*prudentia civilis, civilis sapientia, civilis philosophia*). What he meant was that there was such a thing as the scientific study of the common good. It had the same two basic ingredients as every other kind of science (except for logic, mathematics, and metaphysics): empirical observations and general laws and principles. Civil prudence supplied the general laws and principles of politics and thus complemented history. If history explained what happened at given times and places, civil prudence explained what ought to happen at given times and places. Like the science of history, the science of civil prudence required an empirical component in order to fulfill its purpose. That component consisted of detailed information about the condition of the states whose citizens were trying to achieve the common good. Conring collected such information about as many states and in as much detail as he was able throughout his life, and he presented it in lectures that earned him a reputation as one of the founders of statistics.

Civil prudence was close to Conring's heart because it seemed to offer a solution to the religious disagreements that had been tearing Europe apart. The solution was to distinguish religion from the common good. Religion was a matter of faith; the common good was a matter of politics. In Conring's view there was no necessary correlation between the two. A citizen's religious faith was something altogether different from that same citizen's ability to act as a good member of the commonwealth. Civil prudence taught that peace and

48 Conring [Irenaeus Eubulus], *Pro pace perpetua* (1648).

political unity did not require religious unity. Good citizens were free to hold whichever religious faith they thought was true.

There was one thing, however, that citizens were not free to believe, namely, that civil prudence was wrong because in fact religious faith did matter for the common good. That belief threatened the essence of Conring's solution to the problem of religious war. It did not merely violate the principles of political science, but reason itself. As far as Conring was concerned, it had nothing at all to do with religion; it rather was a dangerous superstition. It fueled the only kind of heresy that still deserved to be considered 'heresy' even on Conring's terms: political action in the name of religious faith—*any* religious faith.

What Conring called political science thus justified an enmity for heresy and superstition that seems difficult not to regard as an expression of some kind of religious faith. Just what kind of religious faith is as unclear today as it was then. It doubtless differed from the confessions that had grown out of the disintegration of the medieval church, and even more so from the religion of that church itself. It looked so different from any familiar form of religion that it seemed easy to reconcile with the confessions and is hard to find in Conring's writings about confessional disputes. But it imposed an ironclad requirement on modern expressions of religion to limit their significance to matters that had no bearing on the common good. Any kind of religion refusing to accept that limitation had to be battled tooth and nail.

Conring's solution to the problem of religious war is therefore not well described as a shift from faith to reason. The fervor with which he justified the use of force against all people who disputed the existence of a clear boundary between religion and the common good and his outspoken willingness to call such people heretics were hardly less religious than the fervor of those heretics themselves. It is the same fervor with which John Locke, more than half a century later, made equally sanguine claims about the possibility of separating every expression of religion from political identity, declared toleration of different religious faiths to be the mark of true Christianity, and went on without any sense of irony to deny toleration to Catholics, on the grounds that Catholics could not distinguish their religious faith from politics, and to atheists, on the grounds that belief in God and the immortality of the soul are plain requirements of reason and ordinary human morality. The potential of this peculiarly modern kind of religious fervor to run amok is all too ominously adumbrated by Conring's charge that those who fail to embrace the principles of science are driven by Jewish zealotry.[49]

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49 More evidence, if any were needed, to support the argument of Nirenberg, *Anti-Judaism*.

I do not think that there is any harm in calling Conring's convictions 'secular,' or in describing the historical development that led to the establishment of such convictions as 'secularization.' But there is real harm in letting such terms obscure the religious basis of his 'secular' convictions. Confusing the progress of secularization with the decline of religion is not only to overlook the lengths to which Conring went in claiming his position to be identical to true Christianity, damning religious claims on politics as heresy, and invoking the wrath of God on people he considered to be enemies of the common good. It is also to ignore the close historical relationship between the abuse of theology during the Middle Ages and that of science in the modern world to justify the exercise of force in the suppression of political dissent.

Hermann Conring and the European History of Law

The final study in this part sums up what I learned about the history of European law by studying the writings of William Durant the Younger and Hermann Conring. It also exemplifies in one specific case just what it means to say that the study of history is itself a part of history. It takes a small step towards the questions about the conventions of the historical profession that I have raised above and shall address in more detail below.

This study has three parts. First, it sketches the history of law in medieval and early modern Europe, meaning the ways in which law changed over time in medieval and early modern Europe. Second, it sketches the origins of legal history, meaning the study of those changes. Third, it uses the results in order to develop a historical perspective on Hermann Conring's writings that does not beg the question of his historical significance by calling him "the founder of German legal history."

The most characteristic feature of the history of European law consists of a conflict between two kinds of law: ancient law, as embodied in the *Corpus iuris civilis* and the canons of the ancient church, on the one hand, and contemporary law, on the other hand. The former was written, but much of it fell out of use during the early Middle Ages until new universities made it a subject of intense academic study in the eleventh century. The latter was sometimes written, sometimes not, and varied in all sorts of ways across the huge number of towns, cities, lordships, and kingdoms comprising medieval and early modern Europe. But it was nowhere the same as ancient Roman and Christian law. In theory, medieval Europeans were living in the same Roman Empire that had been founded by Augustus, converted to Christianity in the fourth century CE, and was expected to last until the end of the world. In theory, they should therefore have lived by ancient law. But in practice, they did not. That difference created a dissonance that was at once legal, institutional, and cognitive.

Legal history arose from that dissonance. But that took time. For centuries Europeans did something quite different from studying the history of law in order to reconcile ancient law with contemporary law: they studied logic. That does not mean that they were unaware how many centuries had passed since antiquity, or how many changes those centuries had brought. It means that they relied on logic in order to achieve a coherent understanding of both ancient and contemporary law. They taught themselves the methods of logical analysis that Aristotle had described in his *Organon* and used them to break ancient law into logical pieces until the pieces were small enough to reassemble in novel forms of legal theory that could accommodate contemporary practice. The results are the glosses, apparatuses, sums, commentaries, and consilia of scholastic jurisprudence. That gave the academic devotees of written Roman and canon law an edge over the lawyers who knew only their local law. By the fifteenth century their success was evident. Europe had given itself something that may be called a common legal culture consisting to varying degrees of Roman, canon, and local law, but everywhere shaped in the image of scholastic jurisprudence.

But that did not resolve the conflict between ancient law and contemporary law. On the contrary, it cast the conflict in a new mold that heightened the dissonance. Precisely because Europe now had a common jurisprudence on which it was more or less agreed—the so-called *ius commune*—a new kind of difference became all the more obvious: not that between the various legal sources the scholars had reconciled with each other, but that between those sources and scholastic jurisprudence itself. The more successfully the scholars resolved the discrepancies between ancient and contemporary law, the more convincingly they proved how deeply scholastic jurisprudence differed from ancient Roman and canon law themselves—not to mention, of course, the Bible. That put scholastic jurisprudence in danger of losing its meaning to a vicious circle.

The invention of legal history by late medieval and early modern humanists pointed a way out of that circle. Humanists did not go down the path of trying to remove the conflict between scholastic jurisprudence and ancient law by means of logical analysis. They did the opposite. Like Protestant theologians pitting the Bible against canon law, they placed that conflict at the center of their work. But they also framed it in new terms. They turned it from a matter of logical contradictions into a matter of differences in time and place. Instead of treating the writings transmitted from antiquity as logical foundations of contemporary jurisprudence, they treated them as evidence for ancient law—and then they treated ancient law itself as a historical source of, or model for, contemporary jurisprudence.

That answered the question how to save contemporary jurisprudence from losing its meaning to self-contradiction. But it did so at the price of casting doubt on the validity of law. Once law was seen as subject to change over time, it lost its standing as a criterion of justice and 'reason in writing.' The first to arrive at that conclusion were Luther and Machiavelli, and the first to propose a workable alternative was Jean Bodin. Bodin had made a more thorough survey of the history of law than any other contemporary scholar. He recognized that justice had to be founded on some principle that, unlike law, was not subject to change over time. That principle was sovereignty. Bodin explicitly required sovereignty to be perpetual and absolute: perpetual, so that it would be exempt from change, and absolute, so that it would be exempt from law. Henceforth jurists were expected to bow to the will of sovereign rulers, and sovereign rulers were free to make the law they pleased. Law lost its independence to history.

The historical significance of legal history is therefore misconstrued if it is limited to the pursuit of knowledge of changes in law over the course of time. Legal historians displaced Roman and canon law into the distance of ancient times and thereby deprived scholastic jurisprudence of its conceptual foundation. In one and the same breath they justified the establishment of a political authority with extralegal powers over the law that was as far removed from ancient Roman and canon law as from scholastic jurisprudence. Far from putting an end to the significance of ancient law in European history, they gave it a new lease on life by using it to overturn the reasons with which scholastic jurisprudence had previously required European rulers to follow the law. In short, the early modern pioneers of legal history performed an act of what I have called anachronistic self-assertion that had unprecedented consequences for the remainder of European history. The essence of their act was to divide the past into two hostile camps—antiquity and the Middle Ages—weaken the claims of both upon the present, and thus leave Europe at liberty to establish its domination in terms of modernity. The importance of their act for our understanding of ourselves is the main reason for the intractability of the distinction between ancient, medieval, and modern history.

By Conring's time the displacement of scholastic jurisprudence by legal history was almost complete. By the nineteenth century it had become difficult to remember how great an effort it had taken. Like Conring, nineteenth-century legal historians provided knowledge of the ways in which law changed over time. But, unlike Conring, they could take the demise of the Holy Roman Empire and the demotion of the Catholic Church from their position of supremacy so much for granted that they no longer had to give a second thought to any limits Roman or canon law might place on the sovereign's legislation. They managed

to make the history of Roman law one of the nineteenth century's signal historical accomplishments. That shows how thoroughly the conflict between ancient and contemporary law had been resolved by legal history. Conring's critique of scholastic jurisprudence had long since lost its significance to a new conflict arising from the very success with which methods like his had helped to lay the conflict between ancient and contemporary law to rest. In that new conflict sovereignty had to contend with, not laws, but constitutions. His designation as "the founder of German legal history" is therefore doubly misleading: first, because it asserts a spurious continuity extending from his work in legal history to that of nineteenth-century legal historians; second, because it hides a continuity between the scholastic study of ancient law and legal history that is all the more profound for being difficult to trace.

Three—Come and Gone: Past Sense

When I accepted Chicago's invitation to move from medieval to early modern history, I did so for two basic reasons. One was that I wanted to make my career at an outstanding university, the other, that it provided me with a professional foundation on which to tackle the familiar periodization of European history. I did not know if history can give us a means of orientation but, having been trained in medieval history, I did know this much for sure: it cannot possibly give us a means of orientation as long as a conceptual wall continues to divide the Middle Ages from modernity. I studied Hermann Conring and William Durant the Younger because I wanted to break through that wall. That is the common thread uniting the six studies in this third part.

Breaking through the wall between the Middle Ages and modernity was far more difficult than I had thought. I knew right from the start that it would never do to ban periodization entirely, as if it were a mere convenience with which historians could dispense at will. Periodization establishes differences between before and after. In principle it does not matter how much time there is 'before' and 'after.' It can be seconds, days, months, years, centuries, or any other length of time. It also does not matter whether the difference between 'before' and 'after' is told in lengths of time or by some other, more meaningful criterion, say, birth, death, marriage, revolution, harvest, size of population, social structure, climate, and so on. What matters is that there can be no history without distinguishing 'before' from 'after.' In that simple and fundamental sense periodization is a condition for the possibility of history. The division of European history into ancient, medieval, and modern periods is merely one instance of a dividing practice without which historians could write no history at all.

I also knew that this particular instance of periodization rested on more than just a whim. It had withstood the test of time for centuries and played a major role in our accounts of Europe's past. It pointed to changes whose significance seemed incontestable, even where they were not well understood. In fact, the periodization of European history did not merely point to those changes: it itself was one of them. It came into existence in early modern times and it displaced other, more ancient forms of periodization, such as the six ages of man and the four world monarchies. It was a part of European history that could not simply be ignored. But, for the reasons I have explained above, it did not make sense of European history in ways with which I could agree. How, then, was it to be replaced?

I was familiar enough with the critiques it had received. I understood the motives of historians who had taken to replacing the boundary between the Middle Ages and modernity with a new period called 'early modern,' and I admired the results of the creative energy they focused on the new period. But I was certain that replacing the old boundary with two new boundaries on either side of the new period—one dividing early modern from medieval history, the other dividing early modern from modern history—was only to displace, not solve the problem.[50]

I agreed whole-heartedly with world historians and historians of the *longue durée* who argued that the beginning of the second millennium CE made for a more fundamental turning point in European history than the fifteenth and sixteenth centuries. But even though their periodization seemed more appropriate to me, it did so for reasons that were empirical. It left the conceptual problem completely unresolved. If it did not provoke as much debate as the conventional periodization, then only because the majority of historians paid it so little heed.

I thought that historians like Quentin Skinner, J. G. A. Pocock, and Reinhart Koselleck were completely right to turn to language for a solution. They put paid to the myth that the history of ideas can be successfully pursued without attention to the specific circumstances by which those ideas were shaped. They took up Wittgenstein's recommendation to study differences between the language-games that people played at different times in different places, and used it to reinvigorate the history of political thought. But what they meant by 'language' seemed much too narrow for a problem that was neither limited to ideas nor to specific contexts, but affected the study of history in its entirety. They did not seem to recognize the force of Wittgenstein's observation that "shared human behaviour is the system of reference by means of which we

50 See Fasolt, "Saving Renaissance and Reformation."

interpret an unknown language."[51] Much less did they seem to notice that Wittgenstein proposed a radical alternative to academic history by calling the *Philosophical Investigations* "remarks on the natural history of human beings."[52] In short, no matter where I looked, what I read, or whom I consulted, I could not find the right conceptual tool with which to solve the problem.[53] I tried to solve it by myself when I contrasted Conring with Bartolus—and my solution exploded in my hands.

Today I can say why: the problem is misconceived. It stems from our failure to recognize the role that periodization plays in our understanding of the past. It is one of the "problems arising through a misinterpretation of our forms of language" that Wittgenstein singled out for attention.[54]

We study the past, we notice differences, and we distinguish one period from another. This is fine. There is no problem here. This is how knowledge works. But then "our thinking plays us a strange trick. That is, we want to quote the law of excluded middle and say: 'Either such a period did exist, or it did not; there is no third possibility!' "[55] That is where our troubles start: we believe we know what we mean; we mean a period, do we not? And did this period (not) exist? It seems to be a reasonable question. But it leads us into the wilderness: *What* did (not) exist? We have no answer to this question. We merely think we do. In fact we are hallucinating meaning, to borrow a fortuitous expression from James Conant.[56] The period is the criterion by which we tell *what* did and *what*

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51 *PI* § 206.

52 *PI* § 415. Cf. *PI* § 25: "Giving orders, asking questions, telling stories, having a chat, are as much a part of our natural history as walking, eating, drinking, playing." For a serviceable introduction to Wittgenstein's conception of "our natural history," see Garver, *Complicated Form of Life*, 149–58, 237–87; cf. Cavell, *Claim of Reason*, 86–125.

53 The most compelling account I have come across so far is Davis, *Periodization and Sovereignty*. For its strengths and limits see Fasolt, "Scholarship and Periodization."

54 *PI* § 111.

55 *PI* § 352, with my apologies to Wittgenstein for modifying his words. He was of course not speaking of historical periods (though he very well could have), but of images floating before someone's mind and the infinite expansion of π. His actual words are: "At this point, our thinking plays us a strange trick. That is, we want to quote the law of excluded middle and say: 'Either such an image floats before his mind, or it does not; there is no third possibility!' – We encounter this curious argument also in other regions of philosophy. 'In the infinite expansion of π either the group "7777" occurs, or it does not – there is no third possibility.' That is to say: God sees – but we don't know. But what does that mean?"

56 "In such cases, we undergo the phenomenology of meaning something determinate while failing to mean anything determinate by our words. Part of what causes us to hallucinate a meaning . . . ." Conant, "Method," 418. Cf. his elaboration of what it means to hallucinate meaning, ibid., 419: "We think the problem lies not in an absence of

did not exist. That makes it meaningless to ask whether the *period* did or did not exist. It is analogous to the confusion epitomized by asking whether the color red does or does not exist: it leads into a metaphysical dead end.[57] There is nothing to be debated there, nothing to be discussed, and nothing to be solved. That is why there can be no end to the debate. We keep debating only because we are confused. We will remain confused until we understand what was so clearly understood by Wittgenstein:

> Here the law of excluded middle says: it must look either like *this* or like *that*. So really – and this is surely obvious – it says nothing at all, but gives us a picture. And the problem is now supposed to be: does reality accord with the picture or not? And this picture *seems* to determine what we have to do, what to look for, and how – but it does not, precisely because we do not know how it is to be applied. Here, saying "There is no third possibility" or "There really isn't a third possibility!" expresses our inability to turn our eyes away from this picture – a picture which looks as if it must already contain both the problem and its solution, while all the time we *feel* that it is not so. Similarly, when it is said "Either he has this sensation, or he doesn't", what primarily occurs to us is a picture which already seems to determine the sense of the statements *unequivocally*: "Now you know what is in question", one would like to say. And that's just what it does not tell you.[58]

The point that Wittgenstein is making here—perhaps the most essential point for understanding what it means to say that something is 'the same' as something else—may be easier to grasp in the following passage, where he speaks of the mistake made by anyone who believes that the length of a rod is independent of the means we use to measure its length:

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meaning (in our failing to mean anything by these words), but rather in a presence of meaning (in the incompatible senses the words already have—senses which the words import with them into the context of combination). We think the thought is flawed because the component senses of its parts logically repel one another. They fail to add up to a thought. So we feel our words are attempting to think a logically impossible thought—and that this involves a kind of impossibility of a higher order than ordinary impossibility. Wittgenstein's teaching is that the problem lies not in the words, but in our confused relation to the words: in our experiencing ourselves as meaning something definite by them, yet also feeling that what we take ourselves to be meaning with the words makes no sense."

57 For the nature of this confusion see *PI* §§ 57–9, part of a line of thought beginning in § 46.

58 *PI* § 352.

> One judges the length of a rod, and may look for and find some method of judging it more exactly or more reliably. So – you say – *what* is judged here is independent of the method of judging it. What length *is* cannot be explained by the method of determining length. — Anyone who thinks like this is making a mistake. What mistake? – To say "The height of Mont Blanc depends on how one climbs it" would be odd. And one wants to compare 'ever more accurate measurement of length' with getting closer and closer to an object. But in certain cases it is, and in certain cases it is *not*, clear what "getting closer and closer to the length of an object" means. What "determining the length" means is not learned by learning what *length* and *determining* are; rather, the meaning of the word "length" is learnt by learning, among other things, what it is to determine length.[59]

This is as straightforward as it can be. On the one hand, it is perfectly natural to say that the length of a given object (an objective fact) does not depend on how we measure it (our judgment of this fact). It is natural because it is quite obviously true: the length of an object does not change merely because we measure it for a second or third time with a different set of tools. Length is not 'purely subjective' or 'socially constructed,' as the language goes. It is a quality a given object has as a matter of fact. But, on the other hand, this presupposes that we know what we mean by 'length'—what length *is*, the *essence* of length—and the meaning of 'length' does depend on measuring lengths, because it is in part by learning how to measure length (judge length) that we acquire the concept of length (what length *is*).[60] Different ways of measuring length make for different concepts of length, different concepts of length make for a different grammar, and a different grammar makes for a different essence.

This is why it is a mistake to think that the length of an object is independent of our method of measuring: not because the length of the object changes when we measure it in different ways, but because our concept of length—*what* we measure—depends on how we measure it. In this sense the length of an object is neither a 'thing in itself' existing independently of us in some utterly objective reality beyond our ken, nor a pure idea existing in some Platonic heaven. It merely appears to be independent of our judgment because

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59 *PPF* § 338. For three different but equally outstanding explanations of the point made in this passage and its significance for our ability to say that something is 'the same' as something else, see Winch, *Idea of Social Science*, 24–39; Cavell, *Claim of Reason*, 168–90; and McDowell, "Non-Cognitivism."

60 I suppose that is the point of the uncertainty principle: what we measure at the level of quantum mechanics is not the same as what we measure at the level of daily life.

our agreement on what it means to measure length (our agreement on *what* we measure when we make judgments of length) is so very firm indeed that we cannot even remember joining it when we learned how to speak. "*Essence*," as Wittgenstein put it in the most general terms, "is expressed in grammar."[61] Note that he did not say "described," but "expressed" (*ausgesprochen*). A thing, an object can be described. But essence is not a thing, much less a self-subsistent kind of thing or an 'idea' in the Platonic sense. The essence of a thing—the answer to the question what that thing *is*—is what we learn when are learning what to call that thing; it is inseparable from our language. "Grammar tells what kind of object anything is."[62]

The mistake made by those who believe that the length of a rod is independent of the means we use to measure it—independent of our commitment to the criteria we use in making judgments of length—makes for a simple analogy to the mistake made by those who believe that a historical period is independent of the means we use to study it. Here, too, it would be very odd indeed to say: "The nature of the Middle Ages depends on the sources we read." Here, too, one wants to compare 'increasingly accurate knowledge of the Middle Ages' with getting closer and closer to an object. Here, too, it is *not* clear just what getting closer to that object is supposed to mean. We do not learn the meaning of 'increasingly accurate knowledge of the Middle Ages' by learning what 'increasingly accurate knowledge' is and what 'the Middle Ages' are. Rather, the meaning of the expression 'the Middle Ages'—what the Middle Ages *are*, the *essence* of the Middle Ages—is learnt by learning, among other things, what it is to study the Middle Ages. It is in this way that the essence of the Middle Ages depends on how we learn the meaning of 'the Middle Ages.' Not reckoning with that dependence is bound to lead to endless confusion.

The mistake can take completely different forms. One form consists of believing that objective facts cannot conceivably depend in any way on how we learn to ascertain such facts, but must exist in some kind of 'reality' of things in themselves, which can then be imagined to be either material or ideal. Another form is based on the 'discovery' that the 'reality' of things in themselves can never actually be known. It consists of believing that there are no objective facts at all. Yet, different though these forms appear to be, they complement each other perfectly and lead into the same wilderness. They show how a confused relationship to our language results in a bad dialectic

61 *PI* § 371.

62 *PI* § 373.

that makes us shuttle back and forth between equally nonsensical forms of hyper-objectivity and hyper-subjectivity.[63]

The hopes and fears inspired by this dialectic have to be counted among the most basic forces governing human history, nowhere more obviously so than in modernity. They cannot be tamed without heeding the observation Wittgenstein made in the passage I chose as one of the two mottos for this book. It deserves to be quoted in full:

> It is not only agreement in definitions, but also (odd as it may sound) agreement in judgements that is required for communication by means of language. This seems to abolish logic, but does not do so. – It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call "measuring" is in part determined by a certain constancy in results of measurement.[64]

Note that 'judgment' here does not mean 'moral judgment.' It means using a criterion—a means of distinction, such as a sample or a rule or, in the case of the Middle Ages, a certain body of writings and remainders from the past—not for the purpose of definition, but as a means of establishing *what* we are talking about.[65]

Agreement in such judgments must be distinguished from agreement in definitions. You can define what you mean, and you can explain what you mean—but you cannot explain what you mean by defining what you mean.[66] Agreement in judgments is what allows us to explain what we mean. It consists of our commitment to the language we have learned to speak. That is what gives us the foundation on which we can proceed to definitions. It gives us to understand what we are trying to define without requiring that we define it in advance. That is what makes it possible for us to use a book like *The Oxford English Dictionary* without running into a vicious circle—in spite of the remarkable fact that *The Oxford English Dictionary* uses the very same words

63 Conant, "Subjective Thought," traces the path from hyper-objectivity (the thing-in-itself) via hyper-subjectivity (there is no truth) to the resolution adumbrated by Nietzsche and thoroughly elaborated by Wittgenstein.

64 *PI* § 242.

65 Cavell, *Claim of Reason*, 1–125, remains one of the best accounts of this meaning of 'judgment.' Garver, *Complicated Form of Life*, 177–96, provides a good overview of the meaning of criteria.

66 "'"Red" means the colour that occurs to me when I hear the word "red"' – would be a *definition*. Not an explanation of what signifying something by a word *essentially* is." *PI* § 239.

whose meaning it explains in order to explain the meaning of other words. Agreement in definitions cannot serve as any such foundation. Trying to use agreement in definitions as a foundation does lead into a vicious circle requiring us to make a definition of what we are trying to define in order to define it. There is no hope of grasping the meaning—the essence—of anything that way. If that is what Socrates was trying to do—which seems doubtful to me—then Socrates was wrong.

Measuring the length of an object is a case in which it is relatively easy—not easy, but relatively easy—to see why communication by means of language requires not merely agreement in definitions, but also agreement in judgments, for example, the judgment that any object exactly as long as a certain piece of metal kept in a certain building somewhere near Paris is one meter long. Without agreement on that judgment (or another one like it, for example, on the length of a hand, an ell, a foot, a pace, or a furlong) we would be in no position to communicate with each other about lengths. We would have no means of telling *what* we are talking about, much less that we are talking about the same thing. The firmer our agreement, the more certain we can be that we are truly communicating with each other, not talking at cross-purposes.

The same is true of historical periods. Historical periods are obviously far more complicated things than lengths. So are the judgments and the criteria that go into the making of a concept like 'medieval.' That makes the grammar of 'medieval' more difficult to master than the grammar of 'length.' Our agreement on *what* we study when we study the nature and extent of the Middle Ages is therefore far more precarious than our agreement on what we measure when we measure the length of an object. Confusion about the nature of a historical period is accordingly much harder to avoid, and communication far harder to sustain.[67] But the principle is still the same. As the essence of length is expressed by the grammar we master when we learn how to measure length,

67 The possibility that criteria may trade places with symptoms—that judgments may trade places with definitions—is a major source of these difficulties. Wittgenstein draws attention to it in *PI* §79: "The fluctuation of scientific definitions: what today counts as an observed concomitant of phenomenon A will tomorrow be used to define 'A.'" In *PI* § 354 he adds: "The fluctuation in grammar between criteria and symptoms makes it look as if there were nothing at all but symptoms." In *PI* § 251 he specifies the source of the confusion as "something whose form produces the illusion of being an empirical proposition, but which is really a grammatical one." Historians rely on evidence to supply them both with the (grammatical) criteria they need in order to determine *what* they are studying and with the (empirical) symptoms informing them of what *was the case* with what they are studying. That makes it particularly difficult for them to avoid confusion and sustain communication.

so the essence of the Middle Ages is expressed by the grammar we master when we learn how to study the Middle Ages. The essence of the Middle Ages is nothing like an object existing out there in the past, much less a Platonic idea. It is a matter of the grammar that tells us what kind of thing the Middle Ages are. Grammar gives us the concept 'medieval.' Without agreement on the judgments that make something 'medieval,' we are in no position to communicate with each other about the Middle Ages, let alone their nature or existence. We have not yet established whatever it may be that we call 'medieval.' The time between 500 and 1500 CE? When classical Latin was not well taught? When society was divided into clergy and laity? When feudal knights went on crusade? When serfs tilled the fields for lords? A textual object at a remove from past reality? All of the above and more? We do not know. We cannot tell *what* we are talking about, much less define it more precisely. All we can do is ask: What do you mean by 'medieval'?

What makes this point so difficult to take is that it "seems to abolish logic." It seems to make the truth depend on human agreement. But our agreement only determines what we are talking about. That is why we are free to change it, and do change it all time. It does not at all determine what is true and what is false. Wittgenstein brusquely rebuts the skeptic who thinks it does:

> "So you are saying that human agreement decides what is true and what is false?" – What is true or false is what human beings *say*; and it is in their *language* that human beings agree. This is agreement not in opinions, but rather in form of life.[68]

But that does not make it much easier to understand exactly how to reconcile the requirement for agreement in judgments—in form of life—with the law of the excluded middle.[69] It is hard enough to understand how to do so in a case as simple as the measurement of lengths. It is much harder in a case as complicated as the study of the past. For as historians we do not only communicate with each other. We also communicate with the people whose history we study—of course not in the sense in which we communicate with living human beings, but in the sense in which we seek to understand the evidence

68 *PI* § 241.

69 Stroud, "Wittgenstein and Logical Necessity," explains the difficulty with great lucidity. It is worth noting that agreement in judgments is not the same as agreement in form of life: the former is narrower than the latter. It makes communication by means of language possible. Our form of life includes a great deal more than communication by means of language.

that has been left behind by people who are now dead. How can we possibly agree in judgments with the dead? How can we agree in form of life with human beings who no longer have any form of life at all? Or do they perhaps have some such form? Is that the meaning of belief in the afterlife? These are questions historians must face. The answers differ from case to case and they are never simple.[70]

I am under no illusion that these remarks suffice to clarify, much less remove, a problem that goes so deep.[71] I do hope they clarify the sense in which the studies assembled in this part deal with the essence of early modern European history. They lead from an uncertain beginning to a certain conclusion. The beginning consists of the problem seemingly posed by the distinction between medieval and modern history. The conclusion is that the problem cannot be solved by means of historical research because it does not lie in the past. It merely seems to constitute a subject for historical research. But that is an illusion. The problem lies with us. It consists of our hesitation to commit ourselves to the criteria—the agreement in judgments, the grammar, the language—on which the meaning of our research depends, especially where that commitment puts us into disagreement with those whose history we study, such as the disagreement we express by distinguishing 'medieval' from 'modern.' The disagreement is real enough. It consists of our unwillingness to subscribe to judgments that were considered right in medieval Europe. It is a matter of politics—the politics of time, if you like. But it is not a problem that could be solved by more research, if only because there is no such thing as saying anything about the past at all unless we are committed to the criteria we use in claiming that something is the case. If we are saying something about the past, the 'problem' has been solved. If it has not been solved, we are not saying anything whatsoever. The 'problem' is a chimera: entirely fictitious and very dangerous.

Visions of Order in the Canonists and Civilians

I got my first chance to write about the passage from medieval to modern Europe when I was invited to contribute a chapter on "Visions of Order in the Canonists and Civilians" to the *Handbook of European History, 1400–1600*. At the time, not long after *Council and Hierarchy* had been published, I had

70 I have given the best answer I can in "Saving Renaissance and Reformation."

71 "The problems arising through a misinterpretation of our forms of language have the character of *depth*. They are deep disquietudes; they are as deeply rooted in us as the forms of our language, and their significance is as great as the importance of our language." *PI* § 111.

already learned a lot about the order William Durant the Younger had tried to preserve and the alternative that Hermann Conring had tried to put into place. I also knew that I could not address the history of the transition from medieval to modern times without exposing myself to the dangers of metaphysical confusion. But I had no idea how to confront those dangers. I therefore limited my methodological commitments to the bare minimum required by the subject I had been asked to treat: a certain group of people, their "visions of order," and the way their visions changed during the period in question. That seemed to be the safest course.

The title I was given referred to "canonists and civilians." But that was too precise. Canonists and civilians were professionally trained at universities in Roman and canon law. They were only one highly specific class among a much larger group of people that qualified as 'jurists' in a much broader sense: experts in local customs, reeves, doomsters, seneschals, lawyers trained at Inns of Court, public notaries with the authority to draw up binding documents, judges, diplomats, city scribes, princely secretaries, humanists, and other kinds of people concerned in one way or another with maintaining public and private order in European villages, towns, lordships, territories, courts, countries, and in institutions like the church, the universities, and guilds. 'Jurist' does not really capture this variety either, but it seemed better than 'lawyer,' 'attorney,' 'advocate,' 'jurisprudent,' and so on, all of which evoke something no less specific than 'canonist' or 'civilian.'

There was a great deal of documentation about some of these 'jurists.' All of them had visions of order of one kind or another. Their visions obviously mattered, even if they were hard to document. What mattered more, however, was that they fit no single definition: they came from different social strata, they lived in different parts of Europe, and they had no single common point of view about the nature and sources of law, much less a shared understanding of the location of the supreme authority in church and state. They fought over questions of religion and reform, politics and war, government by monarchy and government by representation. In short, they constituted a group of people held together, not by some one thing, but by the similarities that Wittgenstein called "family resemblances."[72] That was particularly true of their involvement with the law. Their involvement with the law did not consist of any definite activity, but of an indefinite number of many different kinds of activities.

There was no reasonable hope of grasping all of the different visions by classifying or enumerating all of the different jurists or their activities. The

72 *PI* § 67.

evidence was much too uneven, and in any case enumeration and classification would have required criteria of selection that were only too likely to prejudge the matter by ruling out something that needed to be ruled in. There was only one thing all jurists shared: their disagreements with each other. Their disagreements were the very bond by which they were most closely united. That may seem paradoxical. But it is no more paradoxical than the family whose members are so preoccupied with their disagreements with each other that they pay no attention to anyone intruding from the outside. The issues to which these jurists took different approaches, the problems they tried to solve in different ways, and the battles they fought with each other: that was the ground on which they met, not because they shared the same views on any given issue, but because they shared the issues on which they had conflicting views.

That made it obvious what needed to be done in order to gain a clear perspective on their visions of order overall: to find a single issue on which they all disagreed. That was not difficult. It was the reason for calling them 'jurists' in the first place: their expertise in law. It was their understanding of the law on which they were most obviously divided. As it happened, that was also the most important issue on which they changed, not so much what they were saying, but what they meant when they were saying it.

What they meant by 'law' at the beginning of the period was, roughly speaking, a body of rules that needed to be obeyed by everyone who wanted to be just. Justice consisted of heeding the law, and justification consisted of proving that you had heeded it. Let me repeat: they never agreed on what they meant by 'justice' or what they meant by 'law.' Quite the contrary, the records are full of their debates on just these questions, and their disagreements often went very deep. But they were agreed on this: whatever the law required, it had to be just. If the law did not agree with justice, it did not qualify as law. The law was the criterion with which they tried to settle their disagreements about the meaning of justice.

That changed during the later Middle Ages. It changed because it became ever more difficult to settle disagreements about the meaning of the law. There are good reasons why: increasing social strife, increasing literacy, the Hundred Years War, the Great Schism, increasing knowledge of law, and the development of contradictory perspectives on the nature of justification, to mention a few of them. The upshot was that law lost the trust it had enjoyed in earlier days, not at all because people began to ignore the law, but quite the contrary, because they tried so hard to find the link between the law and justice that they could not but recognize how hard that is to do when circumstances change, difficulties multiply, and experts cannot agree on how the law should be applied in

different cases. For quite a while no one could think of an alternative while everyone was trying to muddle through. But then Machiavelli and Luther severed the ties uniting justice with law for good: Luther, by asserting that justification depended on faith alone; Machiavelli, by showing that princes had to do evil; and both by rejecting law as a means of justification. Thereafter law could no longer serve as a reliable criterion of justice.

The result was the great upheaval we call the age of religious wars. It unleashed hostilities as deep and as enduring as the confusion contemporaries faced whenever they sought to justify themselves and found that neither justice nor law could give them the confidence they needed. It wrought havoc on Europe for more than a century, and it lasted until jurists were able to find an alternative to law as the criterion with which to settle their disagreements. That criterion was sovereignty. It was first proposed by Jean Bodin and soon adopted across the continent.

The adoption of sovereignty is no more to be confused with agreement on a shared vision of order than reliance on law should be confused with such an agreement. Different visions of order continued to multiply, and so did the disagreements inspired by different visions. But the adoption of sovereignty did change the terms of the debate, that is, the essence of both law and justice. Henceforth it was no longer necessary to ask if any given law or given interpretation of the law was 'just.' Sovereignty had taken the place that law had occupied so far, and law had been deprived of its ability to sanction social order. Henceforth it was the sovereign who was responsible for justice. Justice was put into quotation marks or turned into a principle of morality of which it was unclear exactly how it related to public order. With the benefit of hindsight Rousseau could state the point with perfect clarity:

> All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should need neither government nor laws. There is undoubtedly a universal justice which springs from reason alone, but if that justice is to be acknowledged as such it must be reciprocal. Humanly speaking, the laws of natural justice, lacking any natural sanction, are unavailing among men. . . . So there must be covenants and positive laws to unite rights with duties and to direct justice to its object.[73]

Henceforth the crucial question was not whether the law was just, but whether the law expressed the sovereign will. If it did, then it was law. If it did not, then

73 Rousseau, *Social Contract* 2.6, trans. Cranston, 80–1.

it did not amount to law and did not need to be obeyed. At the same time the sovereign was exempted from having to justify himself to anyone except himself and his own judgment of whether his will was in agreement with justice and the will of God. That made it possible to stop fighting religious wars. But it also put brackets around the meaning of justice and laid the conceptual foundations for legal tyranny.

Sovereignty and Heresy

This account of the transition from medieval to modern conceptions of law and politics seemed fair enough to me. It showed that sovereignty marked a radical break and maintained a fundamental continuity at one and the same time: a break, because sovereignty was not the same as law; a continuity, because sovereignty solved the same problem law had solved before. It thus accounted nicely for both of the two poles between which modern theories of sovereignty keep oscillating back and forth: one claiming that sovereignty is a crucial ingredient in secularization (Hans Blumenberg), and the other, that sovereignty is a theological concept in disguise (Carl Schmitt). Yet at the same time I knew that it left much to be desired. It did not show just what was truly novel about sovereignty. It traced the transition from medieval to modern conceptions of law and politics in only one dimension, as if there were a single line through time on which law preceded sovereignty as a criterion of justice—as if the difference between law and sovereignty had been a matter solely of definition, and not of judgment, too.

The best way I could find to capture the difference was to treat sovereignty as an unprecedented kind of heresy—unprecedented because heresy had previously required two ingredients: an opinion conflicting with official religious dogma, and obstinate insistence on that opinion. Sovereignty fulfilled one of those requirements: it was decidedly obstinate in its refusal to bow to ecclesiastical authority. But it did not fulfill the other. As far as religious dogma was concerned, sovereignty was strikingly abstemious. Though sovereigns did not hesitate to make their religious opinions known, and to enforce them too, the institution of sovereignty as such was not attached to any particular form of religion. It was aimed at making sure that no religious disagreements would disturb the peace. That changed the relationship between religion, politics, and law.

I thought the nature of that change could be summed up by making three points. First, sovereignty neutralized the hold of religion on political affairs. By confining the reach of dogma to the private sphere, sovereignty removed the state, public affairs, and the relations between states from the domain of what had previously been counted as religion. That is the reason why the papacy,

only too understandably, refused to agree to the Peace of Westphalia. From the papal perspective, the Peace of Westphalia amounted to peace with heretics.

Second, sovereignty naturalized religion. It was not at all as neutral on questions of religion as it appeared to be. Sovereignty rather changed the criteria with which to settle what should and what should not count as religion. It did so by translating faith in the kingdom of God into faith in the kingdom of nature. The chief article of that faith turned on the distinction between nature and culture: nature was pure and unblemished; culture was pure only insofar as it agreed with nature. The legitimacy of the state depended on the respect with which it treated that agreement.

Third, sovereignty blinded its devotees to the existence of that new faith. Believers in the church of modernity regarded their faith as though it were an obvious and universally acknowledged truth that only ignorant, malicious, or perverted people were able to deny. It never occurred to them how similar that made them to medieval Christians who treated their faith in the same way. They were just as willing to sacrifice their lives and persecute their enemies in the name of nature as medieval Christians had in the name of Christ, and more likely to deny that their enemies were members of the human race. Believers in the modern church do not charge modern heretics with heresy, as medieval Christians did. But they do exterminate them at the stake of inhumanity for their supposedly unnatural acts, unnatural beliefs, and unnatural forms of life.

The old-fashioned distinctions between Christians, Jews, Muslims, heretics, pagans, and other kinds of religious believers thus did by no means lose their strength. If anything, their strength became much greater, precisely because believers in the church of modernity were blind to the continuities that bound them to medieval Christendom.[74] Even while they continued and intensified the persecution of Jews, Muslims, heretics, pagans, and other kinds of believers, they could assert that they were acting solely on principles of reason. They reserved the term 'religion' for the modern variants of long-established faiths, with little regard for the deep differences that separate the modern religions from the medieval church, and no awareness of the religious character of their own faith. In perfectly good conscience they could declare themselves to be beholden to no church at all.

From this perspective sovereignty is poorly understood as a principle of secular rationality, and equally poorly as a religious principle in disguise. It must be understood as both: both secular and religious. Needless to say, that cannot very well be done without an understanding of nature and reason that does not simply place secular reason in opposition to religious faith. It seems to me

74 On such continuities going all the way back to antiquity see Nirenberg, *Anti-Judaism*.

that Wittgenstein's concept of natural history offers just such an understanding. Yet how the modern church could teach that understanding without putting itself at risk of disintegration in cataclysms analogous to those in which the medieval church expired is a question to which I can unfortunately not imagine a good answer.

Empire the Modern Way

"Sovereignty and Heresy" supplied something that had been missing in "Visions of Order in the Canonists and Civilians": a longer temporal perspective and what seemed to me to be a better account of the relationship between the modern state and the medieval church. In that account the modern state looked like a modern kind of church. That raised an obvious question: Might there not be a similar relationship between the modern state and the medieval empire? Might the modern state not be a modern kind of empire, not because some modern states built empires that reached across the globe, but rather because the concept of empire is written into the very essence of the state, regardless of its size and the number of its colonies? Might the most telling feature of the modern state not be its ambition to combine the roles of empire and church under the aegis of Leviathan?

Modern accounts of medieval empire suffer from the same conceptual disability as modern accounts of the medieval church: they oscillate uncomfortably between two equally unsatisfactory alternatives. For some historians, medieval empire differs from modern empires only in its lack of power to enforce obedience to its will. From their perspective, medieval empire was merely weak, but otherwise the same as its modern equivalent. That is fine, because it is perfectly true that medieval empire was just as much a matter of power as modern empire, and because medieval empire really did not manage to harness the kind of power harnessed by modern states. Yet it is also unsatisfactory, because it does not capture what is actually new about empire in the modern world. It treats all empires as if they were the same. Cynicism is its characteristic vice; it leans too far in the direction of continuity.

For other historians, medieval empire constitutes an altogether different kind of political organization. From their perspective what matters about medieval empire is not its weakness in terms of military or political efficiency, but what are often called the mystical qualities allowing it to reach for a kind of universal harmony beyond the possibilities of modern politics. That view, too, is fine, because universal harmony does in fact play a role in medieval empire that it does not play in the modern word. Yet it is still equally unsatisfactory. It celebrates nostalgia, leaning too far in the direction of discontinuity and not reckoning with the eagerness of modern states to sport mystical qualities

and aspirations to universal harmony. As in the case of sovereignty, both views have something to commend themselves, and both suffer from the opposition in which they stand to each other.

In order to see the relationship between medieval and modern empire more clearly, it helps, I think, to focus on the concept with which medieval jurists explained the nature of empire to themselves. That concept was universal jurisdiction, which is to say, the kind of jurisdiction that was the singular prerogative of the emperor—when it was not claimed by the pope, the emperor's chief rival.

Universal jurisdiction must not be confused with the enforcement of any law, especially not enforcement of law in any particular territory over particular people. It must rather be understood as the right to declare for the entire world what is law and counts as just. To use the terms of Wittgenstein, the emperor was responsible for, not what people said or did, but their agreement in form of life; not their agreement in legal definitions, but their agreement in judgments of what qualified as law. As was memorably suggested by the legend of Frederick Barbarossa hidden inside the Kyffhäuser mountain biding his time, the emperor could be imagined to have vanished from the face of the earth and yet continue to watch over his people—just as Ockham believed that the true church needed only a single faithful individual in order to survive, and that Mary may have been the only individual in whom the church survived the day that Christ was crucified. This does of course not mean that law enforcement did not matter. It merely means that law enforcement was not the point on which the emperor differed from other rulers.

Perhaps one could accordingly consider medieval empire a form of universal government in search of territorial significance. There was nothing 'mystical' about that form of government. What prevents us from recognizing it as a perfectly rational form of political organization is that the changes by which medieval empire was eventually eclipsed have made it difficult for us to grasp the sense it made. Those changes are perfectly well known. They turn on the failure of medieval emperors to secure obedience to their will and on the emergence of territorial states whose rulers were defined by their ability to enforce laws that were precisely not universal. Jurisdiction came to be so closely linked to law enforcement that jurisdiction without enforcement became a meaningless idea. What, a modern person might well ask, could possibly be the meaning of jurisdiction if there is no way to enforce whatever judgment has been made? That spelled an end to empire in the medieval sense. But the history of modern states shows only too clearly that it did not by any means spell an end to the search for universal harmony. What changed was rather that enforce-

ment and universality traded places in the grammar of politics: henceforth enforcement came first, and universality came second.

That reversal changed the nature of power. What had once been treated as a variable was now held constant, and what had been held constant was turned into a variable instead. Wittgenstein might have said that a symptom of medieval empire (its lack of territorial power) was turned into a criterion for the absence of real government, and a criterion of territorial power (its lack of universal jurisdiction) was turned into a symptom of modern states. In both cases the symptoms kept spurring demands for reform. But the reforms were different: reform of medieval empire required giving it the power to enforce its will; reform of modern states required endowing their power with universal legitimacy. In both cases the validity of the criterion depended on the success with which the symptoms could be held in check. But the success was different, too: medieval empire succeeded by insisting on its legitimacy to a point at which its powerlessness could be forgiven, while modern states succeeded by raising their power to a height that made resistance futile.

On this logic modern empire turns out to be the same as medieval empire, only turned inside out: not a form of universal government in search of territorial power, but a form of territorial power in search of universal significance. If the chief problem for medieval emperors was how to secure obedience to their jurisdiction, the chief problem for modern empires is how to secure universal significance for the power they exercise so effectively at home and abroad. For medieval empire, universal significance was given; its Achilles heel was lack of power. For modern empire it is the power that is given, and the meaning of power is its Achilles heel. That makes it seem likely that the fate of modern empires does not depend nearly as much on their ability to marshal power as their ability to marry power to significance.

The Limits of History *in Brief*

Each of the three preceding studies focused on the contrast between medieval and modern views of law, justice, and politics. That contrast is not to be confused with history. It is just one among a countless multitude of matters that went into the passage from medieval to modern times. It gave me a nice conceptual grid, a scaffold, a set of criteria with which to analyze the history, but not the history itself. What was that history?

I had no answer to that question. But once I had worked out the logic of Hermann Conring's disagreement with Bartolus, I did know this: the methods I had been taught were not up to the job. They had exploded in my face—not because I had been careless, but because they were part and parcel of the very

history I was trying to write. I had happened upon a short-circuit in the wires supposed to link the evidence to history. The craft of sublimating evidence into pure knowledge of the past had proved to rest on an illusion.

That was a disappointment—but only in the sense in which it is a disappointment to be confronted with reality. It was also a source of great relief and even joy. Precisely because it dashed every hope of going forward in the direction I had been taught to go, it freed me from any obligation to keep going there. It also told me precisely what I had to do next: establish beyond a reasonable doubt that the illusion really is an illusion.

That was the purpose of *The Limits of History*, and that was the problem too. Assume the craft of sublimating evidence into pure knowledge of the past does rest on an illusion: How can one prove it does? How can it be established beyond a reasonable doubt? I knew that the pursuit of objectivity kept driving historians from pride in their ability to grasp the past itself into a meaningless dead end where they lost hope of knowing anything about the past at all and often tried to justify their hopelessness by proving the futility of knowledge. I knew the pride and hopelessness were equally unjustified. But how could that be proved? How was I going to rebut the pride without seeming to justify the hopelessness? How was I going to encourage hope without resuscitating pride?

It was of course not difficult at all to say outright that pure knowledge of the past is an illusion. I did:

> History cannot establish the origin of modern politics any more than it can validate historical thought itself. It can only clarify what we already know from other sources. Far from establishing a temporal perspective, history presupposes one. It shelters us from the experience of time; it comforts us with the illusion that subjects can be defined by their historical conditions and that change over time can be explained by historical developments. "God wants it," the old crusaders would have said. The truth only begins where that illusion ends.[75]

Those were the closing words of *The Limits of History*. They made my point. But how were they to be prevented from lending further strength to the illusion they were intended to expose? Did they not make it seem that there is something there that really does need to be examined, because it really does constitute the origin of modern politics, only, we cannot examine it because it lies beyond our reach—when there is nothing there at all? Did they not treat

75 Fasolt, *Limits of History*, 231–2.

the illusion as a subject worth examination if only we were able to examine it? Did they not endow the illusion with a dignity that it did not deserve?

Again, it was not difficult to say outright that there exists a real alternative to the pursuit of an illusory kind of objectivity, namely, taking one's stand on the "point at which history and politics are indistinguishable from each other," where we meet our own "commitment to a certain view of human nature that has held sway since medieval ways of thought and action were shattered in early modern times."[76] But that only seemed to justify the conclusion "that human agreement decides what is true and what is false," when nothing could have been further from my mind.[77] So far from unveiling the illusion, it was more likely to make my readers jump from the frying pan of objectivity into the fire of subjectivity, which would only have made things worse. There seemed to be no hope of victory by charging at the problem from the front.

Now I know why: metaphysical illusions derive most of their strength from being frontally attacked. That makes them fiendishly difficult to expose. But at the time I did not understand that yet. I knew that Wittgenstein might be the sole exception to the rule that "philosophy, it seems, cannot be counted on to bail out history."[78] I recognized that he did not show any trace of the historicist convictions turning up wherever else I looked. But I had no idea how to bring Wittgenstein's grammatical elucidations to bear on history—and I still find myself awestruck by the astonishing self-discipline with which he managed to refrain from making frontal attacks at all. There was only one thing I knew for sure: a frontal attack would never do.

It followed that my attack had to be indirect. Mounting an indirect attack meant doing precisely what historians are normally supposed to do when they pursue pure knowledge of the past, except that I would do it for quite a different purpose: not to achieve such knowledge, but to reach a point at which such knowledge would stand revealed as an illusion. In other words, I needed to impersonate a historian.

And so I did. I offered the best historical account I could of Hermann Conring's life, the meaning of his *New Discourse on the Roman German Emperor*, and the significance of the conflict between his arguments and those of Bartolus. Then I pushed my account as far as possible into the familiar dead end in order to expose it as the illusion that it is. I asked my readers

76 Fasolt, *Limits of History*, xvi.

77 *PI* § 241.

78 Fasolt, *Limits of History*, 40 and 238n50.

> to peer into the historical distance while looking over their shoulders to catch a glimpse of their own subjectivity—a feat of mental acrobatics that may seem unreasonably difficult. But I know of no other way to gain perspective on history than by a double entendre of whose exasperating quality I am only too well aware.[79]

Neither by chance nor by design, but by a mixture of tinkering and testing I had arrived at my own version of the solution that Wittgenstein proposed to deal with metaphysical illusions:

> The great difficulty here is not to present the matter as if there were something one *couldn't* do. As if there really were an object, from which I extract a description, which I am not in a position to show anyone. — And the best that I can propose is that we yield to the temptation to use this picture, but then investigate what the *application* of the picture looks like.[80]

This was the very difficulty I faced: how to expose the illusion without presenting the matter "as if there were something one *couldn't* do" (namely, grasp the history of the transition from medieval to modern Europe objectively), "as if there really were an object . . . which I am not in a position to show anyone" (namely, a real past lying ineffably beyond the limits of history). This was the best I could propose: "yield to the temptation to use this picture" (that is, do what we are trained to do in order to achieve objective knowledge of the past), "but then investigate what the *application* of the picture looks like" (that is, show that doing what we are trained to do produces the illusion that there is something there about which it is impossible to say anything).

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79 Fasolt, *Limits of History*, 45.

80 *PI* § 374. The difficulty Wittgenstein addresses in this paragraph concerns the metaphysical picture of a mental object that someone has, but cannot show to anyone, as, for example, the visual impression someone has when he sees an object he calls 'red,' but which he cannot show to anyone, and of which he can therefore never know whether it is the same as the visual impression other people have when they see something they call 'red.' The picture of such a mental object as actually existing in someone's mind is of course quite different from the picture of the past as an object actually existing in the past. But it is the same in this crucial respect: it gives us the illusion that there is something there about which it is impossible to say anything. This is the chimera against which our understanding of the past must be defended.

I thought it worked well enough. I thought it explained "why I decided firmly against a title or subtitle mentioning Conring and Bartolus."[81] I thought it showed that the attempt to grasp what Conring 'really' thought was bound to make his real thought appear to be impossible to grasp, and the attempt to grasp what the distinction between medieval and modern times 'really' meant was bound to make its real meaning vanish from sight. But it did not work quite as well as I believed. I wrote:

> History is a limited form of knowledge. Within those limits it can do good work. Outside of those limits it cannot exist. History needs no improvement. It is as good as it has ever been. It needs to be no better. . . . The problem is not that history has not yet gone far enough. The opposite is true: history has constantly gone too far—too far in its ambitions and too far in its claims. History is burdened with tasks it cannot possibly fulfill. It cannot tell "wie es eigentlich gewesen," and it should never have been asked to do so. That is what saps its meaning. Expecting history to reach the reality of the past is to allow oneself to be seduced by a mirage arising not from the past but from a historical imagination run amok. . . . If history is to do well what it can do, its limits need to be affirmed. Merely describing them is not enough. They are so deeply buried beneath the scholarship daily produced by professionals who cannot afford to have their concentration interrupted by doubts about the foundations of their enterprise that they are difficult to see and easy to forget. They must be shown in the concrete, and their effects need to be driven home until they cannot be ignored.[82]

That said exactly what I wanted to say. It said that claims to truth about the past cannot be justified without criteria of judgment; that such criteria are part of our agreement in our form of life; that such an agreement is a matter of training, teaching, and commitment; and that without such training, teaching, and commitment there is no place for reason, evidence, or proof.

But I did not say it in those terms. I had not yet read deeply enough in the *Philosophical Investigations*. I did not distinguish between, on the one hand, the straightforward sense in which the limits of history—the criteria on which we need to be agreed in order to be able to answer the question "How do you know?"—constitute the possibility of knowledge about the past and, on the other hand, the metaphysical nonsense that makes those very same limits

81 Fasolt, *Limits of History*, 45.

82 Ibid., 40.

look like a veil concealing an ineffable reality from us or, worse, a prison of the mind. I was too eager to hunt the illusion down and put it out of its misery. I did not say loud and clear enough that in fact we can tell the truth about the past by practicing a certain discipline whose limits are set by nothing other than by the kind of discipline it is. I never distinguished clearly enough between the truth that we can tell and the illusion that leads us into a metaphysical morass. I said, "this book sets out to show in one instance what separates us in all instances from an adequate understanding of the past"[83]—and I forgot to add that 'all instances' only meant 'all instances in which we surrender to the allure of metaphysics.' I made it seem as if 'what separates us in all instances from an adequate understanding of the past' meant the same as 'there is something that always separates us from an adequate understanding of the past'—"as if there really were an object, from which I extract a description, which I am not in a position to show anyone."

No wonder my readers found it difficult to understand what I had tried to say. Some did not realize I was impersonating a historian. They thought the book was about Conring, Bartolus, and the origins of modern historical thought, full stop, and were naturally puzzled by whatever else I had to say. Perhaps I ought to have made my point with greater force; a friend suggested using an axe. Some readers even seem to have believed my purpose was to demonstrate that Conring invented modern historical research, which was downright amusing. But others, who did realize that I was impersonating a historian, thought I was doing so in order to deny that we can tell the truth about the past at all. That was not so amusing, flying directly in the face of what I had tried to convey.

I was therefore delighted when the editors of *Historically Speaking* decided to publish a forum on *The Limits of History* that gave me an opportunity to rule out some of the most basic misunderstandings.[84] I was not yet in a position to bring Wittgenstein's distinctions to bear directly on what I had meant to say—and if I had been, I could not very well have done so in that setting. But there were two things I could do: one was simply to repeat as succinctly as possible what I had tried to say, and how I had tried to say it in *The Limits of History*; the other was to make it perfectly clear that

83 Ibid., 45.

84 Fasolt, Megill, and Spiegel, "An Exchange." I would like to thank Donald Yerxa and Joseph Lucas for giving me the opportunity, and Allan Megill and Gabrielle Spiegel for making me think harder.

> I share none of the gloom arising from the view that language is a self-referential system, such that its signs do not allow us to gain access to reality itself, but only to linguistically constructed reality. . . . I could not agree more that our knowledge is linguistically constructed. But far from making it unreal, that is what makes it knowledge.[85]

"All Sorts of Slogans"

What next? I might have gone on to look more closely at the damage we are doing to our understanding of the past by fighting with chimeras. But I was reaching a point of diminishing returns and tired of focusing on the negative. At the same time I did not want to spend my energy on new historical investigations without knowing how to resolve my doubts. From this point forward I focused increasingly on looking for the light the *Philosophical Investigations* can shed on history.

I was of course far from the first: historians and social scientists have paid significant attention to Wittgenstein ever since the *Philosophical Investigations* were published in 1953. Since the 1970s their writings have turned into a veritable flood, and concepts like "language-game," "family resemblance," and "form of life" have become well-nigh ubiquitous. Had it not been for Wittgenstein, some of the deepest changes in the study of history and society in the last fifty years would scarcely have taken place. That goes not only for specific cases, like the attention lavished on individuals and their ideas in their specific contexts under the leadership of Quentin Skinner and J. G. A. Pocock in what is often called the Cambridge School, or the "thick description" advanced by Clifford Geertz and cultural anthropologists, but also for the whole change in intellectual climate often referred to as the "linguistic turn" that sharpened the conflict between quantitative and qualitative studies and deepened long-standing doubts about the very possibility of a true science of society.[86] Wittgenstein figures prominently in that turn, and he deserves much of the credit for the great progress historians and social scientists have made in studying individuals (free, unfree, male, female, young, adult, single, married, literate, illiterate, . . .) in their respective contexts (economic, social, political, cultural, intellectual, linguistic, . . .) and thereby reshaping the humanities and social sciences in their entirety.

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85 Fasolt, "*Limits* in Brief," 10.

86 See, for example, Jay, "Intellectual History," Toews, "Intellectual History," and Spiegel, ed., *Practicing History*.

At the same time it seems to me that the most fundamental lessons of the *Philosophical Investigations* have been ignored or misconstrued.[87] As recently as 1999, almost half a century after Wittgenstein's death, Stanley Cavell deplored the "immunized state" of philosophy in America and insisted that Wittgenstein had had virtually no "public or historical effect on this philosophical culture."[88] A few years earlier Newton Garver put it more strongly:

> On the one hand [Wittgenstein's] prestige is enormous, and his presence as a figure in the philosophical landscape cannot be overlooked; on the other hand his impact has been minimal. . . . Wittgenstein has no significant following. People recognize him, read him, cite him, and discuss him; but few take up philosophy in his manner, or modify their thinking in line with the main thrusts of his work. . . . This curious state of affairs is to be explained, I believe, by a combination of three factors. The first is a concentration on subordinate details, such as the nature of objects, the picture theory, family resemblance, and the private-language argument. It is not that these details are not important: details are always important. But they are also subordinate to main thrusts. The second factor is that the main thrusts of his works have been ignored—the holism and the ethical thrust of the *Tractatus*, and the representation of philosophical remarks in the *Investigations* as part of the natural history of mankind. This leads into the third factor, for the neglect of main thrusts almost inevitably leads to a distortion of Wittgenstein's thought.[89]

This is not to gainsay the progress made under Wittgenstein's inspiration. But it is to say that our progress has done nothing to shake our attachment to historicism, by which I mean the doctrine that anachronism must be avoided at all cost; that it cannot be avoided unless we put past human thought and action into the context of its specific time and place; and that the context of that specific time and place exists as such, out there, in the splendid isolation of a past whose essence has nothing to with our present. That doctrine

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87 As Wittgenstein himself suspected would be the case: "It is not impossible that it should fall to the lot of this work, in its poverty and in the darkness of this time, to bring light into one brain or another – but, of course, it is not likely." *PI*, 4e.

88 Cavell, *Claim of Reason*, xviii, xx.

89 Garver, *Complicated Form of Life*, 73–4. One need not agree with Garver's understanding of Wittgenstein or with every detail of the evidence with which he documents his claims, ibid., 74–85, in order to agree with his conclusion. Crary and Read, eds., *New Wittgenstein*, provides a great variety of arguments supporting the same basic point.

has been the common wisdom of historians ever since the nineteenth century. Ranke put it succinctly: "Every epoch is immediate to God, and its worth is not at all based on what derives from it but rests in its own existence, in its own self. . . . The historian thus has to pay particular attention first of all to how people in a certain period thought and lived."[90] This is as clear a statement of the metaphysical autonomy of the past, and as firm an admonition to avoid anachronism, as anyone could wish. We are admonished to respect the sanctity of every epoch's immediate relationship to God and to abstract from the historical context in which we happen to be living, so as to focus on that "certain period" to which we need "to pay particular attention first of all." The admonition draws its strength from the belief that the sole effect 'our' context can have on our knowledge of 'their' context is to pollute its purity. Historicism is supposed to preserve that purity. It makes a categorical distinction between 'our' present and 'their' past. It reduces our knowledge of the past to two basic elements: the (past) facts and their (present) interpretation. It demands that we divide our reading into primary (past) sources and secondary (present) sources, so that we can then place the primary sources into 'their' context. Historicism makes us forget entirely that 'their' context is 'our' past and that 'our' present is part of the context into which we must place the sources. It takes us out of the history we study.

The problems involved in taking a historicist position have long been understood. They take shape in such questions as how to reconcile the 'narrative' or 'diachronic' method favored by Ranke with the 'structural' or 'synchronic' method favored by Burckhardt; how to speak in present terms about past phenomena without committing anachronism; how to understand the relationship between the evidence and its meaning; how to account for the difference between 'intellectual' and 'social' history; what to make of the distinction between history in the sense of 'books about the past' and history in the sense of 'the past that actually happened'; and so on. Notwithstanding the obvious differences in emphasis and terminology, these problems already preoccupied Herder, Humboldt, Ranke, and Burckhardt long ago. They are the same problems with which historians, anthropologists, political theorists, sociologists, and other social scientists still struggle today. These same problems are equally visible in attempts to reconcile the 'qualitative' with the 'quantitative' social sciences; the dysfunctional desire to 'fuse' the historian's horizon with the horizons of the past, as Gadamer would have it in one the most sophisticated versions of historicism; and the hostilities provoked by post-structuralism, deconstruction, and gender studies. No doubt that we have made much prog-

90 Ranke, *Theory and Practice*, 53.

ress in the name of Wittgenstein. By now Ranke's advice has been taken to lengths that would astonish him. But we have solved none of the fundamental problems with which we have been saddled by taking his advice. The "crisis of historicism" remains as acute today as when it was diagnosed as such by Troeltsch early in the twentieth century.[91] So far from having made a turn, we live in the most recent and most prolific phase in historicism's long career.[92]

Whether this phase will be the last is utterly unclear. Clear is only that "on both sides of the Atlantic we still have the impact of Wittgenstein's thought to look forward to," for Wittgenstein did break with historicism.[93] He did not merely counsel historians to place past people in their contexts and study the language-games they played. Much less did he prohibit anachronism, or promise that we can somehow rise above past people to see something they could not see because they lacked some concepts we possess. To the contrary, he kept insisting that it is nonsense to imagine a given language as lacking anything at all. He never practiced the subtle forms of condescension that constitute the original sin of historicism. He recognized fully how deep the differences between the languages we speak can go, and he may have attributed greater importance to context than any other philosopher. But he also pointed out that there is a "system of reference by means of which we interpret an unknown language," and that system of reference is precisely not the context of a particular time and place, but our "shared human behaviour" (*die gemeinsame menschliche Handlungsweise*).[94] He thus leveled the playing field between the ages in ways that differ categorically from Ranke's, and tried to take us to destinations quite different from those envisioned by historicism. He broke through historicism's basic creed and for good measure cast more basic doubt on the distinction between culture and nature than anyone since ancient Greek sophists first put it to systematic use. He thought of language as a "spatial and temporal phenomenon" that is "as much a part of our natural history as walking, eating, drinking, playing."[95] Note that the history of which he speaks is both "natural" and "ours." He showed how to undo what the historicists have done.

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91 Troeltsch, *Historismus*.

92 For a compelling account of distinct, but closely related intellectual continuities extending from Kant to the present see Pippin, *Modernism as a Philosophical Problem*.

93 Garver, *Complicated Form of Life*, 85. Perhaps the growing success of the "New Wittgenstein" is a sign that things have begun to change.

94 *PI* § 206.

95 *PI* § 108 (boxed remark), and *PI* § 25.

In a memorable passage Wittgenstein wrote a few days before he died he pointed out what it might mean to study history without historicist assumptions:

> Is it wrong for me to be guided in my actions by the propositions of physics? Am I to say I have no good ground for doing so? Isn't precisely this what we call a 'good ground'? Supposing we met people who did not regard that as a telling reason. Now, how do we imagine this? Instead of the physicist, they consult an oracle. (And for that we consider them primitive.) Is it wrong for them to consult an oracle and be guided by it? — If we call this "wrong" aren't we using our language-game as a base from which to *combat* theirs? And are we right or wrong to combat it? Of course there are all sorts of slogans which will be used to support our proceedings. Where two principles really do meet which cannot be reconciled with one another, then each man declares the other a fool and heretic. I said I would 'combat' the other man, — but wouldn't I give him *reasons*? Certainly; but how far do they go? At the end of reasons comes *persuasion.* (Think what happens when missionaries convert natives.)[96]

These words are trouble for students of both culture and nature. They ought to leave us deeply disturbed. They challenge us to look beyond "all sorts of slogans" and face up to a choice that we cannot avoid by hiding behind the imaginary walls on which the logic of historicists depends. Which will it be? Should we approach the natives inhabiting the past in the same missionary spirit to which historicism owes its life? Or should we combat and conquer them? Should we deploy the weapons of modern science and scholarship to prove their ignorance and folly? Or should we humbly lower ourselves to their level of comprehension and graciously forgive them their primitive state of mind? How should we deal with people who differ from us, not because their form of life is different from our own, but because they have died? *De mortuis nil nisi bene* is how the old commandment goes: nothing but good about the dead. How can we possibly write history and not break that commandment? I know of no good answers to these questions.[97] To me they seem impossible

96 Wittgenstein, *On Certainty*, §§ 608–12.

97 One of the very best was given by Winch, "Understanding a Primitive Society." By contrast, Stroud, "Wittgenstein and Logical Necessity," shows very clearly how hard it is for us to make sense of any behavior that is not grounded in our form of life. Wittgenstein made that point in *PPF* § 327: "If a lion could talk, we wouldn't be able to understand it." Would we be able to understand the dead if they could talk?

to answer without going "the bloody *hard* way," as Wittgenstein advised Rush Rhees to do in philosophy.[98]

Trying to go "the bloody *hard* way" in history has led me to write studies that I have not included here because they belong to a new program of research that is still in its infancy.[99] But there is one exception: an essay on "Religious Authority and Ecclesiastical Governance" in which I revisited the history of the transition from medieval to early modern Europe in order to exemplify what might be gained by treating that transition as a change in criteria of judgment. I have to admit I doubt that it leads very far; in fact it may not even lead in the right direction. If it does not, at least it helps to illustrate how easy the bloody hard way is to miss.

Religious Authority and Ecclesiastical Governance

"Religious Authority and Ecclesiastical Governance" is the first study in which I ever tried to bring Wittgenstein's ideas to bear directly on history. It begins with a brief sketch of progress from medieval oppression and the persecution of heretics to modern freedom of religion in the familiar terms of combat with the medieval past that Conring helped to invent, and to which we are still so deeply indebted that we have not been able to replace them with an equally compelling alternative. The most important feature of that history is that it depends on agreement in our form of life, and therefore goes only as far as the criteria of judgment on which we are agreed when we speak of such things as freedom and religion. This history treats what was a change in judgments as though it had merely been a change in definitions. It does not address the question how we came by the criteria on which we are agreed today, and it does little justice to the criteria deployed in medieval times.

The first thing I tried to do, therefore, was to explain what it means to be joined by agreement in judgments. The best way to do so is to give an example. The example I chose is our agreement on the standard meter bar as the criterion by which we determine length. I chose it both because it figures prominently in the *Philosophical Investigations*, § 50, and because it is one of the simplest ways to make the basic point. The point is that it is nonsense to assert that the standard meter bar is one meter long. Precisely because we use it as the criterion with which to tell *what* is one meter long, it makes no sense to say that *it* is one meter long. We can of course use other criteria to answer ques-

98 Conant, "On Going the Bloody Hard Way," 85.

99 They are, in chronological order, "History and Religion," "Respect for the Word," "Saving Renaissance and Reformation," and "Breaking up Time."

tions of length, for example, in order to determine if the piece of metal we use as the standard meter bar is still as long as it once used to be. But in that case we are not using the standard meter bar as a criterion of length. Our measurements of length depend on our agreement on the means we use to judge what is and what is not one meter long. We are entirely at liberty to change our agreement and start using other means. Our liberty in this regard is not constrained by anything other than our consent. This does not mean that our consent determines what is and what is not one meter long, nor does it mean that the standard meter bar has some mysterious power. It means that our standard meter bar is utterly exempt from judgments of length simply because we have agreed to use it as the means with which to make such judgments.

Having tried to explain what a criterion of judgment is, I used the standard meter bar as an analogy for the criteria of judgment on which people in medieval Europe were agreed in order to distinguish what is true from what is false, particularly concerning the foundations of their society. Three of those criteria stand out: one consisted of letters transmitted in writing from antiquity, especially the letters of Sacred Scripture; another consisted of the judgment of experts capable of bringing the machinery of Aristotelian logic to bear on those letters in order to determine their meaning with scientific precision; the third consisted of the judgment of the papacy in cases of dispute.[100]

Just as the standard meter bar loses its standing as a criterion of measurement as soon as we subject it to measurement itself, so the judgment of the papacy lost its standing as the criterion of the true faith as soon as the papacy was subjected to human judgment. It was in this sense that the papacy was utterly exempt from judgment: not because there was no means of judging it—there were plenty such means—but because judging it meant treating it as something other than the papacy. Just as the exemption of the standard meter bar from measurement is the result of our agreement to use it as a criterion for measurements of length, so the exemption of the papacy from human judgment was the result of an agreement to use the judgment of the papacy as a criterion for the true faith. Just as it is nonsense to say that the standard meter bar is one meter long—not true, not false, but nonsense—so it was nonsense to say that the pope was wrong. More precisely, it was nonsense for those who joined in the agreement. For those who did not, it was not nonsense by any

100 For the sake of simplicity I speak of the judgment of the papacy when I really ought to be speaking of the judgment of the church. The relationship between the papacy and the church, however, is such a complicated issue that I cannot address it here, and could not address it in my essay.

means, but an expression of their dissent from the agreement. That is what made them heretics.

Having prepared the ground like this, I went on to describe the history of the transition from medieval to modern history. The essence of that history consists of changes in the criteria on which the inhabitants of medieval Europe had been agreed. The details turn on the development of new forms of knowledge and education, new technologies of war and government, and new kinds of disagreement over the foundations of society. So far as they can be compressed into a brief account, they are described in the essay reproduced below. But there are two general points worth making here.

One is that the history in question can be divided into three stages: the Renaissance, in which the agreement in question was gradually extended to people other than clerics and to criteria other than sacred letters, particularly mathematics and the writings of classical antiquity; the Reformation, in which people like Luther and Machiavelli proposed new kinds of criteria for new kinds of agreement that destroyed once and for all the possibility of keeping the old agreement intact; and the age of religious wars that broke out when the lack of agreed-upon criteria made it impossible to tell exactly what was in dispute. It ended when Europe managed to form a new agreement on new criteria of judgment around the time of the Peace of Westphalia.

The other point is that this is not the history of progress from oppression to liberty. If it is the history of progress at all, then only progress from a medieval combination of oppression and liberty to a modern combination of oppression and liberty—a history in which we have committed ourselves to judgments that pit us so firmly against the Middle Ages that it would be dishonest to conceal the disagreement. It is of course quite true that religious faith was turned into a matter of individual belief, which means, it was withdrawn from the public realm—the only realm in which criteria of judgment make sense—and placed into the private realm of personal belief, in which there is no room for using criteria at all. That gave believers a new kind of liberty. But it is also true that in the public realm we came to agree on new criteria that are precisely as exempt from any human judgment as the papacy once used to be, and which no human being may dispute without putting itself at risk of being treated as a heretic. The day when we will clamor for liberty from the tyranny of the standard meter bar will probably never arrive, both because standards of measurement are too important to leave to individual belief and because it is relatively easy to agree on them. Yet there may well come a time when we will clamor for liberty from the tyranny of science, reason, and the will of the people; some of us already do.

Hegel's Ghost: Europe, the Reformation, and the Middle Ages

"Hegel's Ghost" is the final essay in this collection, both because it was published last and because it spells out some of the main conclusions to be drawn from the preceding studies. Its origins go back as far as the first time I met Eric Cochrane, late in 1982, at a meeting of the American Historical Association in Washington, for a job interview concerning the position in early modern European history the University of Chicago had opened. I cannot recall exactly what he said, but it was roughly this: "Julius Kirshner and I would like to stay south of the Alps. We need someone to teach the Reformation. Is that something you would be willing to do?"

Ever since that meeting the Reformation has occupied a great deal of my attention. I never taught anyone about William Durant the Younger or Hermann Conring. But I regularly taught courses on the Reformation for both graduate and undergraduate students. I read the secondary literature and the primary sources, I studied the history of Reformation historiography from the nineteenth century to the present, I kept up with contemporary trends in the scholarship, subscribed to the appropriate journals, and I attended the usual conferences. Every now and then I gave papers addressing the Reformation in one way or another. But I never tried to turn those papers into publications. I did not want to spend my time climbing a mountain of scholarship at the risk of having to blow it up in order to be able to say something new. I preferred moving straight into the wilds of seventeenth-century history, both because I enjoyed the prospect of roaming those wilds and because I was convinced that I could change our understanding of the Reformation without confronting it directly, by seizing control of the ground on both of its chronological flanks in order to break through the wall between the Middle Ages and modernity. That was a more basic and more important task. If that task could be completed, I thought the Reformation would take care of itself.

Three things changed my mind. The first was that I climbed much higher on the mountain of Reformation scholarship than I had ever thought I would. In the process I came to hold some definite ideas about its weaknesses. I wanted to publish those ideas. The second was that Tom Brady invited me to a conference at the Historisches Kolleg in Munich that he was organizing for the explicit purpose of considering alternatives to well-established views of Reformation history. This was an opportunity that I could not resist. The third and most important was that the conventional periodization of European history proved utterly impervious to my entreaties from the flanks. Eventually it dawned on me that it is quite impossible to change a scholarly tradition as deeply entrenched as that periodization unless you do attack it directly from the front. In this

regard a scholarly tradition is the opposite of metaphysical illusions—even if the illusions drive the scholarship. Given how many bricks in the wall between the Middle Ages and modernity were taken from the Reformation, a direct attack on Reformation historiography seemed worth a try.

At first "Hegel's Ghost" was nothing more than a short paper for the conference Tom Brady organized. It made two basic points: one was that even today Reformation historians are much too closely identified with the ideas of sixteenth-century reformers to be able to give the Reformation the place it deserves to have in the history of Europe; the other was to assign such a place to the Reformation by treating it as an important phase in a continuous development beginning with the "First European Revolution" and the Investiture Controversy in the eleventh century.[101]

Both of these points fly in the face of two basic characteristics of Reformation historiography today. One is the palpable sense of pride with which Reformation historians tend to assert that they have finally managed to distance themselves from the ideas of sixteenth-century reformers, chiefly by establishing the pre-eminence of social and cultural history over theology. The other is that they have traced the roots of the Reformation to late medieval social and intellectual history—but certainly not to the foundation of the papal monarchy in the eleventh century. I have yet to meet a historian of the Reformation who is willing to agree with me that Martin Luther was a direct successor of Pope Gregory VII.[102]

I have a fond memory of Tom Brady sitting next to me while I was reading my paper, turning to me when I had finished, and whispering with a broad smile: "You just made my conference." What he meant, I think, was not that he agreed with me, but that my paper would provoke debate. It did, and the debate was vigorous. But it gave me no reasons to change my mind. If anything, it strengthened my belief that I had hit my target.

The paper was published in the conference proceedings under the title "Europäische Geschichte, zweiter Akt: Die Reformation." I would probably have left it at that if Tom Brady had not prodded me early in 2003 to translate my "wondrous provocation" (his words) into English and publish the translation in order to make it more easily accessible to students in the United States.

Translating was not difficult, and neither was extending and improving the argument in light of what I had learned since 1999. Getting it published was. I sent it to the *American Historical Review* in 2004, where it got mixed reviews and was rejected in 2005. I sent it to *Past & Present* in 2006, where it got mixed

101 Cf. Moore, *First European Revolution*.

102 Historians of the Middle Ages and world historians have been more willing to agree, sometimes to the point of expressing surprise that this might be controversial.

reviews and was rejected in 2007. I sent it to the *Archive for Reformation History* in 2007, where it was instantly rejected for being too long. Each time it was rejected, I made revisions and additions suggested by the anonymous reviewers who had evaluated my submission, and to whom I am grateful for forcing me to keep sharpening my points. *Viator*, not coincidentally a journal published by a center for medieval and Renaissance studies, finally accepted it and published it in 2008 under the title "Hegel's Ghost: Europe, the Reformation, and the Middle Ages." In the process my short paper grew to three times its original length, and I was reminded once again how deeply the interests of the historical profession are vested in keeping the Middle Ages separate from modernity. I was also given an unexpected opportunity to realize with pleasure and amusement how thoroughly I had fulfilled the conditions on which I had been hired by the University of Chicago. I realized it in a flash when one of my most sympathetic anonymous reviewers remarked that, much though I evidently knew about early modern Europe, there was good reason to be troubled by my lack of training in medieval history.

"Hegel's Ghost" thus differs from all of the preceding essays. It is the only piece I ever wrote that deals directly with the Reformation, and it is also the only piece I aimed directly at overturning a well-established scholarly tradition. I could never have written it without having done the research I did on William Durant the Younger and Hermann Conring, much less the *Philosophical Investigations*. But it does not bear any obvious traces of that research at all. It confirms the accuracy of Thomas Kuhn's observation that "in history, more than in any other discipline I know, the finished product of research disguises the nature of the work that produced it."[103]

"Hegel's Ghost" lays down a challenge to prevailing accounts of the Reformation. It focuses on the Reformation not just because my professional career happened to have turned me into something of an expert in Reformation history, much less because Tom Brady encouraged me. It focuses on the Reformation because the Reformation lends powerful support to my old enemy, the traditional periodization of European history. Ever since the days of Hegel, Marx, and Weber the Reformation has been regarded as a crucial, if not the crucial, turning point from medieval to modern history. Hegel, Marx, and Weber were of course deeply divided in their assessment of the reasons why the Reformation played that role. But they were in complete agreement that, for whatever reasons, it pointed directly to the beginning of modern history.

The Reformation is obviously not the only candidate for the beginning of modern history. Many historians give equal or greater weight to other candidates: the Renaissance, the Scientific Revolution, the rise of capitalism,

103 Kuhn, *Essential Tension*, x.

the European conquests overseas, the Enlightenment, the French Revolution, the Industrial Revolution, nineteenth-century urbanization, and so on. Nor is the Reformation the only instance in which historians are struggling with metaphysical illusions. Metaphysical illusions proliferate wherever history is carried out under the banner of historicism. The history of nationalism, imperialism, colonialism, capitalism, classes, gender, sex, ideas, culture, material culture, society, economy, Christianity, religion, revolution, war—you name a subject of historical investigation, and I will show you a metaphysical illusion. But there is one way in which the Reformation does stand out. I know no other field of study—except perhaps world history and early medieval history—in which historians have mounted a more concerted, more sustained, more vigorous, and more widely recognized effort to break the shackles of the conventional periodization of European history.

They have done so in three main ways. First, they have diminished the significance of theological differences between Catholics, Lutherans, Calvinists, and other kinds of believers to a point where it is possible to treat all of them as allies—unwitting and unwilling allies, but allies nonetheless—in one and the same cause: a pan-European process of political, religious, and social development often referred to as 'confessionalization.' Second, they have raised our esteem for late medieval social, religious, and intellectual life to such heights that it is now difficult to tell exactly how the reformers broke with their predecessors, or even if they really did break with them at all. Complaints about the supposed 'abuses' of the late medieval church are rarely heard today. Third, together with their cousins in Renaissance history they have replaced what used to be a clearly marked divide between medieval and modern history with an entire 'early modern' or 'late medieval and early modern' period extending roughly from the beginning of the Renaissance to somewhere in the seventeenth century. Two hundred years ago there was almost unanimous agreement that, for better (from a Protestant perspective) or for worse (from a Catholic one), the Reformation marked a major break in world history. If there is any single theme that has held Reformation scholarship together over the last half century, it is the single-mindedness with which historians have tried to abolish that agreement.

I do not believe they have succeeded. In spite of their best efforts they remain beholden to the very understanding of European history that they are seeking to overturn. Their history exemplifies how difficult it is to exorcise a metaphysical illusion as deeply embedded in our relationship to our past and ourselves as Hegel's belief in history as the progress of liberty and the Reformation as the herald of liberty for all. That is the point of "Hegel's Ghost."

"Hegel's Ghost" makes its point in three steps. First, it reviews Reformation historiography since the nineteenth century in order to highlight a striking

paradox. On the one hand, Reformation historians have tried to diminish the significance conventionally attributed to two kinds of distinctions: the chronological distinction between the Middle Ages and modernity and the theological distinctions between Catholics, Lutherans, Calvinists, and so on. On the other hand, they continue to rely on those same distinctions in order to define their field of study. However well they have transcended confessional and chronological distinctions in other ways, they have not transcended them in the one way that really counts: they still do not include the history of the Reformation in the history of the Middle Ages, much less the history of the medieval church. This is certainly not because it would be difficult to do. To the contrary, the insights Reformation historians have won over the last fifty years demonstrate nothing more clearly than that the history of the medieval church meets every one of the criteria they have identified as characteristic of 'confessionalization': the development of clear theoretical ideas, new standards, propaganda, measures against counter-propaganda, education and training, discipline, ritual, and influence on language.[104] In light of those criteria the history of the Reformation really ought to begin in the eleventh century. I can think of only two reasons why no historian of the Reformation seems to agree: because in that case the Reformation would have begun in the very center of the Middle Ages and because it would have been led by the Catholic Church. If nothing else proves that Reformation historiography continues to be defined by the same chronological and theological distinctions between medieval Catholics and modern Protestants by which it was governed when Hegel declared the Reformation to have ushered in the modern world, this does.

Second, "Hegel's Ghost" examines medieval historiography in order to establish how easy it would be to do away with the conventional periodization if only modern historians could bring themselves to let it go. There is a large body of compelling scholarship leaving no reasonable doubt that it was in the century or two after the collapse of the Carolingian Empire that the foundations of European society acquired their characteristic shape. That moment was decisive for all of Europe's later history. Whatever happened later did nothing to break the frame built in those days—at least not until the nineteenth and twentieth centuries broke the frame of each and every one of the agro-literate civilizations in which most human beings had been living since agro-literate civilizations were first established in the ancient Near East roughly five thousand years ago. This is by no means to deny the significance of the Reformation. If nothing else, the Reformation allowed European states to claim spiritual authority for themselves, take more effective control of the souls and bodies of their subjects than the medieval church had ever managed,

104 Reinhard, "Pressures," 177–8.

and find new subjects for their power beyond Europe's frontiers. No doubt that was a major change. But its significance has to be seen in context. The context consists of the amazingly consistent, ruthless, and successful determination with which Europeans used an unusual combination of politics, technology, and science in order to subject humanity to their control ever since the eleventh century. So long as historians continue to take modern European history out of that context, they cannot tell just what made modern Europe tick, much less that the medieval church was the first modern state, and that it failed for reasons not unlike those wreaking havoc with the world today.

Third, "Hegel's Ghost" sketches a conjectural history of Europe beginning in the eleventh century. It has to be conjectural because we have not done the work required to turn conjecture into history. A wealth of empirical details lies right at our fingertips. But scarcely anyone is using it to show what is the same in medieval and modern European history. The reason is not that we have not yet done enough research, but that we keep looking in the same old way at every new thing we find: medievalists at medieval things, modernists at modern things, theologians at theology, and scientists at science. "One thinks that one is tracing nature over and over again, and one is merely tracing round the frame through which we look at it."[105]

We think that the new things we find by means of empirical research will tell us what there is to learn. It never occurs to us that we must change our sight. We do not understand that looking for new things does not do us much good unless we learn to see those things in a new way, precisely as no one who has only seen the rabbit in the famous duck-rabbit drawing in the *Philosophical Investigations* can see the duck without learning a new way to see the duck-rabbit drawing—and this despite the fundamental fact that those who can see both duck and rabbit are looking at the identical 'empirical details' as those who cannot.[106] Many medievalists and many modernists can only see the rabbit. They need to see the duck: the modern state in the medieval church; the modern left in medieval friars; modern science in medieval theology; the modern fact in the medieval text; and vice versa for each of these. They will not learn to do so by studying empirical details.

It does not follow that seeing modern history in medieval history is 'merely an interpretation.' What follows rather is that there is no such thing as seeing only empirical details. Our knowledge of what is, and what is not, 'the same' in medieval and modern history is simply not a matter of empirical detail. It is a

105 *PI* § 114.

106 See *PPF* § 118, and the extended discussion of the concept of seeing that follows thereafter.

matter of the judgments—the grammar—on which our understanding of the past and ourselves depends.[107]

Historians who want to understand the past without praying to Hegel's ghost must therefore make a choice. On the one hand, they can commit themselves whole-heartedly to the theological criteria from which the concept of the Reformation drew meaning since early modern times. That might be difficult to do today, but it would certainly make sense. In that case they would be justified in taking a firm stand in favor of (or against) the Reformation. Hegel would be alive and well. On the other hand, they can commit themselves whole-heartedly to the criteria by which all human beings are said to be endowed with the same rights, without respect to "race, color, religion, sex, or national origin," to quote a familiar list taken from Title VII of the American Civil Rights Act of 1964. In that case they would have to refrain from writing history in light of the criteria advanced by sixteenth-century reformers. The concept of the Reformation would lose the meaning it used to have, and the changes that came over Europe in early modern times would take their place in the context of a much longer history. Hegel could finally rest in peace. That would make sense as well. What does not make sense to me is to assert, on the one hand, that Reformation history must not be governed by theological criteria while, on the other hand, taking the Reformation out of the context of European history since the eleventh century.

Conclusion

I started my career with a straightforward question: Can history give us a means of orientation? The program of research I have described above leaves me convinced it can, except that it does not give us the means that we would like to have.

What we would like to have, I think, is something like a compass or a map to point us in the right direction when we have gotten lost in time. We hope that all we need to do is to look up some source of information that tells us where we are and how to get from here to there. We are entirely familiar with the experience of getting lost in a strange place and looking up a map in order to get back on track in space. Why not make such a map for history? Why should it be impossible to use the records and remainders surviving from the past in order to create a map of time that we could use to plot our movement into the future? It is an eminently plausible analogy.

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107 See Winch, *Idea of Social Science*, 24–39, and McDowell, "Non-Cognitivism," for more detail on what it takes for us to say that something is 'the same' as something else.

That gave me a good reason to spend my energy on studying the past. What I was being taught in history made sense to me: put your opinions on one side and do not put your trust on anything you cannot verify yourself, at least in principle. I had no reason to believe that my opinions could be relied upon to guide me out of the fog that blanketed West Germany when I was growing up. The contrary was true: because my opinions were being formed beneath that fog, I had good reason not to rely on them at all.

The records and remainders surviving from the past were quite another matter. Their meaning was often opaque, but they themselves were fixed. They did not change as soon as someone's opinion changed and could be checked by anyone who cared. That made it reasonable to believe that they could steer me straight. I did not know that I was following in the footsteps of those early modern historians whose writings I would study much later on. I imagined, as Descartes put it in a classic formulation, that

> I would be imitating a traveller who, upon finding himself lost in a forest, should not wander about turning this way and that, and still less stay in one place, but should keep walking as straight as he can in one direction, never changing it for slight reasons even if mere chance made him choose it in the first place.[108]

But walking straight in one direction led me straight into problems that were impossible to solve. One problem was the difference I noticed early on between the meaning William Durant the Younger wanted his words to have and the meaning his words did have in fact. I could not place him on the map I had in mind, not merely for accidental reasons, but for reasons embedded in the very effort to define his location with precision.

I ran into a similar problem when I was working on Hermann Conring. But Conring also gave me two other problems to stop me in my tracks. One was the injustice Conring did to Bartolus by begging the questions that Bartolus had asked. That was similar to the problem I had encountered with Durant, except that it did not concern the place in time where Conring was located, but his relation to the past. I needed to find a way of getting from Bartolus to Conring. It was supposed to lead across the boundary between the Middle Ages and modernity. But no such way seemed to exist. Each way I tried ran out in a begged question.

The other problem was that I could find no reason why my critique of Conring ought not to be turned against myself. That hit home. Like Conring, I was trying to use evidence as a control on my opinions in order to construct a

108 Descartes, "Discourse on the Method," 123.

map in time. Like Conring, I seemed to be divided from the past by some abyss that was impossible to map. My research had landed me in a dead end: here was the evidence, there was the past, and there was nothing in between.

I had been familiar with that dead end for a long time. I knew that I was working with the distinction between the 'object' and 'subject' of knowledge that constitutes the basis of modern scholarship and science, and I was well aware of the critiques to which it had been subjected ceaselessly since Hume and Kant. I knew the very intelligibility of history and science were withering under the impact of Nietzsche and his successors. That was precisely why I was doing my work as a historian. I knew the theory. I knew it led into a dead end. But I did not know whether the theory was true. I wanted to test the theory. The test was putting it into practice.

If someone had reminded me of what I had read in the *Philosophical Investigations* when I was still a graduate student in philosophy—that "*essence* is expressed in grammar," that "grammar tells what kind of object anything is," and that, "when we say, *mean*, that such-and-such is the case, then, with what we mean, we do not stop anywhere short of the fact, but mean: *such-and-such – is – thus-and-so*"[109]—it would have gone in one ear and straight out of the other. I could only have taken it to mean one of two things: either, that language constitutes a prison-house for our minds that bars our access to the reality of things so absolutely that what we take to be the facts is merely a construct of our minds; or, that somehow our minds enjoy a pre-established harmony with the reality of things so absolute that our ideas turn out to be identical to it. On the one hand, there was Roland Barthes and the "referential illusion" preventing historians from understanding that their books have nothing to do with the real past. On the other, there was R. G. Collingwood and the "a priori imagination" of historians reconstructing the real past in their own minds.[110] Each view was equally remote from Wittgenstein; each had an alluring beauty. But neither made any sense to me.

I therefore did the next best thing: I split the difference between the alternatives and tried to make the pieces fit. I had not understood how thoroughly Wittgenstein had changed the subject "by turning our whole inquiry around."[111] I did not realize what he was saying when he wrote that "the agreement, the harmony, between thought and reality consists in this: that if I say falsely that something is *red*, then all the same, it is *red* that it isn't. And in this: that if I want to explain the word 'red' to someone, in the sentence 'That is not red',

109 *PI* §§ 371, 373, 95.

110 Barthes, "Discourse of History"; Collingwood, *Idea of History*.

111 "The *preconception* of crystalline purity can only be removed by turning our whole inquiry around." *PI* § 108.

I do so by pointing to something that *is* red."[112] I thought he was denying the reality of reality. I was in the grip of the distinction that had gripped Conring, too, and that keeps gripping us today: here the words, and there the things. I thought what everybody thinks: that grammar is a purely linguistic matter and that the reality of things cannot have anything to do with it. I was convinced I knew just what the question was. The question was obviously this: how to explain the relationship between our ideas and the reality of things. I had not thought it through.[113] I was the fly that cannot find its way out of the fly-bottle of modern metaphysics.[114]

That did not change until the practice of writing the history of William Durant the Younger, Hermann Conring, and the passage from the Middle Ages to the modern world brought me up short. It changed because the dead end in which my practice landed me was not a matter of mere theory that I could have ignored for the time being in hopes of finding some solution later on. It was only too real, it could not be ignored. It had to be faced right then and there.

That forced me to retrace my steps and opened my eyes to the mistake I had been making all along. The mistake was "to look for an explanation where we ought to regard the facts as 'proto-phenomena'. That is, where we ought to say: *this is the language-game that is being played.*"[115] Instead of staking my case on the language-games that I was actually playing—reading books and evidence about the past, excerpting them, arranging the excerpts in different ways, figuring out their meaning, comparing them with other books and pieces of evidence, looking for logical inconsistencies, consulting dictionaries, consulting bibliographies, following up clues in footnotes of scholarly articles, asking colleagues for advice, writing papers, giving papers, responding to criticism, and so on—I had staked my case on the distinction between thought and reality. Here the ideas of William Durant the Younger and Conring, there the structure of their society; here the text, there the context; here the evidence, there the interpretation; here the historian, there the past. "Here the word, there the meaning. The money, and the cow one can buy with it."[116] I never understood that

112 *PI* § 429.

113 Conant, "Subjective Thought," shows what it takes to think it through.

114 "What is your aim in philosophy? – To show the fly the way out of the fly-bottle." *PI* § 309.

115 *PI* § 654.

116 *PI* § 120.

> when I talk about language (word, sentence, etc.), I must speak the language of every day. So is this language too coarse, too material, for what we want to say? *Well then, how is another one to be constructed?* – And how extraordinary that we should be able to do anything at all with the one we have! In giving explanations, I already have to use language full-blown (not some sort of preparatory, provisional one); this is enough to show that I can come up only with externalities about language.[117]

No wonder I had wound up at a dead end. Right from the start I had been trying to give explanations where explanations have no place. I had kept coming up with nothing but externalities and, incredulous that my intelligence would not allow me to formulate material results, I had kept trying to endow the externalities with metaphysical reality. No wonder I had got stuck. I had rejected the grammar I needed to make sense and tried to replace it with fictions of my imagination. My very first step had led me astray.

> The first step is the one that altogether escapes notice. We talk of processes and states, and leave their nature undecided. Sometime perhaps we'll know more about them – we think. But that's just what commits us to a particular way of looking at the matter. . . . (The decisive movement in the conjuring trick has been made, and it was the very one that seemed to us quite innocent.) – And now the analogy which was to make us understand our thoughts falls to pieces.[118]

The solution was simply not to take that first step, but go in the opposite direction. "One might say: the inquiry must be turned around, but on the pivot of our real need."[119] My real need was not to adopt "the theoretical attitude," as Marie McGinn has called it, but to "*look and see*."[120] Instead of using my reading as an occasion to make up mental fictions in order to "*see right into*

117 *PI* § 120.

118 *PI* § 308, where Wittgenstein is talking about misguided attempts to explain thinking in general. *Mutatis mutandis* the problem is the same with attempts to explain thinking about the past.

119 *PI* § 108.

120 McGinn, *Wittgenstein*, 16. Cf. *PI* § 66: "Consider, for example, the activities that we call 'games'. I mean board-games, card-games, ball-games, athletic games, and so on. What is common to them all? – Don't say: 'They *must* have something common, or they would not be called "games" ' – but *look and see* whether there is anything common to all. – For if you look at them, you won't see something that is common to *all*, but similarities, affinities, and a whole series of them at that. To repeat: don't think, but look!"

phenomena," I had to keep reading, listen to what my reading was telling me, and then respond in my own words.[121] I had to accept that there is only one foundation on which I could so much as start learning about the past, namely, my "natural human reaction," as Hannah Arendt called it in the first of the two mottos I chose for this book.[122] My work in history was fine. My problem was that I did not believe it was, for reasons that have nothing to do with history. My scruples were misunderstandings.[123] So I had noticed the difference between the meaning Durant wanted his words to have and the meaning his words did have in fact. So what? That difference is precisely one of those proto-phenomena "where we ought to say: *this is the language-game that is being played.*" It stands no explanation. It does not require the invention of a hypostasized "author" who means what he means, and a hypostasized "context" that influences his meaning. It has nothing to do with evidence or data. There is no theory for it. It is part of the foundation on which we do explain whatever can be explained. Nothing could be more commonplace.

Of course there is a difference between what 'I mean' and what 'it means.' Of course the words to which I have committed myself by speaking them can be turned back on me. There is no problem there. On the contrary, that is precisely what it means to think, to speak, to mean what we have said, and to subject it to critical analysis. That is what makes it possible for us to say 'that is not what I meant,' 'I changed my mind,' 'I disagree with what you say,' 'I have no idea what to make of that,' 'I am convinced that's true,' 'that is not what you said,' 'that is not what it means,' 'that is not what happened,' and so on. That is what makes it meaningful to ask 'what do you mean?', 'what reason do you have for saying that?', and 'are you sure?' This is the point where reason and liberty begin: the point at which we say that 'I' am not to be confused with

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121 *PI* § 90: "We feel as if we had to *see right into* phenomena."

122 Arendt, "Reply," 78. Note that Arendt is speaking of the "natural human reaction" of a historian studying the Industrial Revolution. This is the reaction of someone trained to read, and inconceivable without such training. Like Wittgenstein's concept of "natural history," her concept of nature thus straddles the boundary normally dividing nature from culture in the same way and it justifies an attitude to the past that is equally far removed from historicism. As she goes on to say, ibid., 79: "Reflections of this kind, originally caused by the special nature of my subject, and the personal experience which is necessarily involved in an historical investigation that employs imagination consciously as an important tool of cognition, resulted in a critical approach toward almost all interpretation of contemporary history." I could not agree more.

123 "How can these observations satisfy us? – Well, your very questions were framed in this language; they had to be expressed in this language, if there was anything to ask! And your scruples are misunderstandings." *PI* § 120.

'you' or 'it' or 'they,' and exercise our right to act on that conviction. Such is our form of life.

The same goes for the disagreement that Conring had with Bartolus and the abyss that seems to separate historians from the past. Of course a disagreement cannot be given a coherent explanation. That is precisely what makes it a disagreement. It cannot be reduced to matters of definition. A difference in definition alone is not enough to constitute a disagreement. "Disputes do not break out (among mathematicians, say) over the question whether or not a rule has been followed. People don't come to blows over it, for example."[124] A disagreement turns on both judgments and definitions. It affects our form of life. It cannot be solved the way we solve equations. If it could, it would not be a disagreement. The same is true about the difference between the present and the past. Of course the difference between the present and the past is irreducible. Why else would we use different tenses? But why on earth should we believe the difference between the tenses amounts to an abyss? Should we stop using different tenses then? It is not always easy to find out what happened in the past. Fine. It is not always easy to find out what happens in the present either, and may even be happening right now in your own house. Of course we practice anachronistic self-assertion. We put the past into its place. How else could we conceivably write history?

I can well understand why grammatical distinctions like those between the persons and the tenses may come to puzzle us.[125] Like other parts of grammar they seem to have no bearing on the reality of things and lack logical consistency. I can understand why that can make us want to transcend them in favor of logic and scientific objectivity. But I cannot imagine a thought transcending the difference between what 'I mean' and what 'it means,' or that between the tenses. Much less can I imagine how such a thought could be subjected to rational critique. It is a thought no human being can actually have. Who could subject it to critique? The very desire for such a thought strikes me as diabolical—and I mean diabolical, not just absurd. It sacrifices reason to what Stanley Cavell has called the "craving for totality" and the "rejection of the human."[126] It turns us into enemies of every human being that says 'I.' The

124 *PI* § 240.

125 For succinct demonstrations of how difficult it is, not to use those distinctions, which we do all the time without having to give them a second thought, but to explain their meaning, consider Anscombe, "The First Person," and Anscombe, "The Reality of the Past."

126 Cavell, *Claim of Reason*, 236, echoing the "craving for generality" attacked by Wittgenstein, *Blue and Brown Books*, 17.

history of that enmity, especially in the last hundred years, cannot be understood unless we learn to recognize that grammar, so far from being a 'purely linguistic' matter, makes up the essence of humanity.

That is the main conclusion to which I have been led by the research I started in graduate school. It means that history can very well give us a map with which to orient ourselves in time, but only so long as we remember that every history, like every map, has its own meaning, and that its meaning depends on more than evidence. Maps can be good for driving, hiking, biking, flying, sailing, climbing, fishing, hunting, walking, and finding places to eat, drink, sleep, mate, fight, and get away from it all. Each map is different from the others: its meaning changes when circumstances change, as does its reliability. Does that make it inadequate to the reality? It seems a silly question. A map of everything would be no map at all.

The same is true of history. The histories we write do not fall from the sky: someone must write them first, someone must understand them, and no one can do so without having learned to speak a language when they were growing up some time, some place. There is a great deal more to that than evidence. That has to be accepted. It constitutes no limitation on our knowledge. It rather constitutes the basis of critical inquiry. "What has to be accepted, the given, is – one might say – *forms of life*."[127]

The great attraction of the form of history we have been taught since early modern times was that it promised to found our knowledge of the past on nothing but evidence. It seemed to relieve us of responsibility for the judgments to which we commit ourselves in reading and writing history. All understanding of the past for which there was no evidence was to be rooted out as mere opinion. All judgment was to be cast aside in favor of objectivity. That promise justified the division of European history into ancient, medieval, and modern periods. It made good sense in the seventeenth century, when people like Conring and Descartes were trying hard to find a reasonable way out of religious war. It still made sense in the nineteenth century. Now it no longer does. It keeps us focused on evidence when we ought to be looking for a foundation on which to write a true history of our kind. It stops us from taking responsibility for the condition of our time. Its sense is past.

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127 *PPF* § 345.

PART ONE

Holding On:
William Durant the Younger (*ca. 1266–1330*)

CHAPTER 1

The Manuscripts and Editions of William Durant the Younger's *Tractatus de modo generalis concilii celebrandi*—Revised

There is no thorough study in existence that does full justice to William Durant the Younger's (ca. 1266–1330) *Tractatus de modo generalis concilii celebrandi*, written on the occasion of the Council of Vienne.[1] It is one of the most important writings in the early history of conciliarism and has accordingly found a place in most of the literature dealing with conciliarism and the political theory of the thirteenth and fourteenth centuries.[2] But it is obviously far too long and complex to be exhausted by the kind of treatment possible in works of such a general nature. If one turns to the specialized literature on Durant's life,

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* Originally published in *Annuarium historiae conciliorum* 10 (1978): 290–309.

I would like to thank professors Paul Oskar Kristeller, John H. Mundy, and Robert Somerville for having read and criticized this article. {I have taken advantage of the opportunity furnished by the inclusion of this article in the present volume to improve the manuscript descriptions and correct mistakes. Wherever it made sense to do so, I have identified such changes by enclosing them in curly brackets, as in the present instance. Where new text is running into old text, I have inserted footnotes to explain what was changed. I would like to thank Sean Dunwoody for checking manuscript catalogs that were not included in the third edition of Kristeller, *Latin Manuscript Books before 1600*, but were added to the fourth edition revised by Sigrid Kramer in 1993, and for checking as many additional catalogs published since then as possible. It was both disappointing and reassuring that this did not lead to any previously unknown manuscripts of Durant's treatise.}

1 William Durant the Younger's name is spelled differently by different authors in different languages. Heber, *Gutachten*, 65, Andrieu, *Pontifical romain*, 3:3n1, and Viollet, "Guillaume Durant," 2n2, consider arguments for various spellings. I have adopted the spelling preferred by Viollet since his is the authoritative biography, but I write 'William' instead of 'Guillaume' or 'Guilielmus' etc. {I am grateful to Reinhard Elze for pointing out that R. Heckel, "Eine Kanzleianweisung," 110n4, establishes 'Duranti' as the correct form of the name. I nonetheless continue to write 'Durant,' in part for the sake of consistency, but chiefly because I agree with my teacher John Mundy that, whenever a well-established modern form is available for names with a different medieval form, the modern form is preferable.}

2 See for example Dempf, *Sacrum Imperium*, 421; Carlyle, *History*, 6:24–5; Haller, *Papsttum und Kirchenreform*, 58–66, 70; Hofmann, *Repräsentation*, 253–5, 257; Jedin, *Geschichte*, 1:5, 7, 471, 510; Rivière, *Problème*, 363–9; Scholz, *Publizistik*, 208–23; Tierney, *Foundations*, 190–9.

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his thought, or the *Tractatus* itself, one is disappointed.[3] Where one had hoped to find analysis, {290 | 291} one is presented with paraphrase, sometimes embellished with acute observations and detailed information, but paraphrase nonetheless. One suspects the dense technicality of Durant's book of being the reason why the attention given to it has never led to a comprehensive study. But whatever the reasons for the lack of such a study, if one wants to understand Durant's treatise, its design, and its place in the history of conciliarism, one needs to examine it in detail.

The first obstacle to a full understanding is the fact that the manuscripts in which the treatise has been preserved have never been listed in one place, much less collated with the printed editions.[4] To proceed on a sound basis, one first needs a complete list of manuscripts containing the whole or parts of Durant's treatise, and then the manuscripts must be compared with each other and the printed editions.[5]

The present article is devoted to the first of these tasks: identifying the relevant manuscripts, giving some information about their history, contents, and bibliography, and drawing whatever conclusions about the history of Durant's *Tractatus* this evidence warrants.[6] The printed editions will {291 | 292} also be

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3 Against the background of the Council of Vienne Durant is considered by Heber, *Gutachten*, 40–56, 64–74; Lecler, *Vienne*, esp. 38–50; E. Müller, *Vienne*, esp. 587–8, 591–610. Other studies to be mentioned are Viollet, "Guillaume Durant," which must be the basis for all further work; Bellone, "Cultura e studi," Göller, "Geschichte der italienischen Legation," Posch, "Reformvorschläge," and Torquebiau, "Gallicanisme." Finally there are articles in handbooks and encyclopedias, notably Mollat, "2. Durant (Guillaume)," and Naz, "Guillaume Durand."

4 Even Viollet, who seems to have been the only scholar to use several manuscripts in his work on the treatise, mentions only the five manuscripts we have designated P, C, Ma, Tr, and Tu. It escaped him not only that P divides the text in a manner quite different from that of the printed editions, but also that the second part of the treatise takes the same form in P, C, Ma, and Tr (Tu is fragmentary; see below pp. 132–3): all of these manuscripts contain a section in part two which is identical to chapters 3–30 of the third part of the printed editions. Viollet noticed this only with regard to Tr and then mistakenly identified the transposed section with the entirety of part three in the printed editions; see Viollet, "Guillaume Durant," 79n2, 82n1. The manuscripts we designate O, R, and Z in this survey are entirely unknown in the literature on William Durant the Younger.

5 The editions will be briefly discussed below, pp. 147–9.

6 Given the state of manuscript cataloguing, one can never be sure of having a complete list of all the manuscripts of a given text, but I have made an effort to cover as many bases as possible. This is the place for me to thank the librarians—their number is close to three hundred—who assisted me in my search by answering a circular letter. The fact that their answers added only one new manuscript to my list, namely R, of which I was made aware almost simultaneously by U. Morelli of the Biblioteca Nazionale Centrale in Rome and by

briefly considered. But I will make no attempt to weigh the merits or defects of one copy of the text against the others.[7]

There is, however, one point concerning the manuscript versions of the text that needs to be brought up in order to avoid confusion. The division of the text into three parts in the printed editions is found in the manuscripts, too, but with an important difference. Whereas the printed editions contain seventy-two chapters or 'titles' in the second part and sixty-three in the third, i.e., a total of one hundred and thirty-five chapters in parts two and three combined, the manuscripts have the same total of one hundred and thirty-five chapters, but divide it differently: one hundred chapters in part two, and the remaining thirty-five in part three. Put differently, the twenty-eight chapters numbered 2.72–99 in the manuscripts are numbered 3.3–30, in the printed editions, and the chapter numbered 2.100 in the manuscripts is numbered 2.72 in some of the printed editions. That makes part two considerably longer and part three considerably shorter in the manuscripts than in the printed editions.

The explanation for this confused state of affairs and the reasons for preferring the arrangement of the text as found in the manuscripts will not be considered here.[8] It must be borne in mind, however, that the following discussion is based on the manuscripts. If 'part three' is said to be missing from a manuscript, 'part three' refers to the short version of part three found in the manuscripts {which corresponds to the *Tractatus minor*}, not the long version of part three as found in the printed editions. Similarly, if a manuscript is said to contain 'parts one and two,' what is called 'part two' consists of one hundred

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Dr. Martin Bertram, may perhaps be taken to corroborate my claim for completeness. It goes without saying that I would be very grateful for any additional information.

7 I hope to address that problem at another time. {See below, chap. 2, which establishes the superiority of the manuscripts here designated as P and M over the printed editions and introduces the distinction between *Tractatus maior* and *Tractatus minor* to indicate that the work printed under the title *Tractatus de modo generalis concilii celebrandi* does not consist of one treatise, but two different treatises that had originally been distinct, but were conflated in the printed editions. Wherever it seemed necessary, I have referred to *Tractatus maior* and *Tractatus minor* in the remainder of this article, even though I was not yet aware of the distinction when it was first published. For a detailed analysis of the manuscript transmission see Fasolt, "William Durant the Younger's *Tractatus*," 54–100; for a stemma of the manuscripts see Figure 1, below, p. 158.}

8 {The explanation is that at some point in the manuscript transmission twenty-eight chapters of the *Tractatus minor* were transposed into part two of the *Tractatus maior*, which made the argumentative structure of both treatises unintelligible, obliterated the distinction between them, and led to their treatment as a single treatise in three parts; see below, chap. 2.}

chapters and includes the twenty-eight chapters placed into part three in the printed editions.

1 The Manuscripts

Each manuscript will be identified by a siglum as well as current and older shelf marks. The sections entitled 'description' provide information about the make-up and contents of the manuscripts, followed by references to catalogs describing them. {Fascicules consisting of more than one gathering are identified by capital letters in parentheses: (A), (B), (C), ... Different sections of content are identified by arabic numerals in parentheses: (1), (2), (3), ... Subdivisions within different sections of content are identified by lowercase letters in parentheses: (a), (b), (c), ... Extensive descriptions are given wherever such information could be obtained, sometimes chiefly from published catalogs, as for C, Ma, Tu, and Z, otherwise through correspondence, as for P, M, Tr, B, O, and R.} C and M, the two manuscripts I have seen myself and not examined only in microfilm, are marked with an asterisk. The sections entitled 'bibliography' refer to passages where the manuscript under consideration is mentioned but not described. They are intended to be complete only as far as the literature on William Durant the Younger is concerned.[9] The sections entitled 'history' give further information about the history of Durant's book.

P = Paris, Bibliothèque Nationale, ms. lat. 1443 (*Colbert 2530; Regius 4239*$^{3-1}$)

Description:[10] parchment, s. XIV, 112 fols. {285 × 210 mm. Justification 195 × 145 mm. Eighteenth-century binding in red morocco decorated with the royal arms. The text is divided into two columns. Fols. 98–112 are damaged by humidity, which destroyed the original foliation in roman numerals. The foliation has been rewritten in a modern hand.

The volume is made up of fourteen quaternions. In each quaternion the four initial folios are signed at the bottom as follows: in the first quaternion, hori-

9 {See the index for references to these manuscripts in this volume.}

10 I am indebted to Denise Bloch, Conservateur, Bibliothèque Nationale, for information on the composition, decoration, and history of this manuscript. {The description has been entirely rewritten on the basis of details provided by Denise Bloch in 1978, and by Marie-Thérèse d'Alverny, Monique-Cécile Garand, Gilbert Ouy, Bernard Bischoff, and Neil Ker in 1981. I am grateful to Amandine Postec, Conservateur, Bibliothèque Nationale, for confirming the accuracy of the revised description in 2013.}

zontal strokes from one to four, ⎽ = ≡ ≣; in the following seven quaternions, up to fol. 64^{v}, vertical strokes from one to four, l ll lll llll; in the remaining six quaternions, letters with superscript vertical strokes: a^{l-llll}, e^{l-llll}, d^{l-llll}, c^{l-llll}, b^{l-llll}, and o^{l-llll}. The end of each gathering is marked by a catchword at the bottom of the page that is decorated with a pen and ink drawing. The text is decorated in blue and red framing with blue, red, and violet filigrees (fol. 1) and with blue or red initials with blue, red, and violet filigrees and branches that are occasionally decorated with a human head (fols. 24^{vb}, 25^{rb}, 27ra, . . .). The decoration appears to be of Southern French origin. Two initials are decorated with fleurs-de-lys (fol. 2^{vb}, 8^{vb}). The titles are rubricated. There are contemporary marginal annotations and corrections, especially on the first folios. Marginal annotations of the late sixteenth or early seventeenth centuries (fols. 77ra, 81^{rb}) draw attention to differences between this manuscript and the one used for the printed edition.

When I realized that P is the sole surviving representative of one of the two main branches of the manuscript transmission of Durant's treatise, the question of its date and origin became so important that I sought the advice of Marie-Thérèse d'Alverny, Monique-Cécile Garand, Gilbert Ouy, Bernard Bischoff, and Neil Ker, to all of whom I am grateful for their paleographical expertise and the detailed responses they sent me in 1981.

There was general agreement that the main script, a rotunda or littera textualis formata, most likely dates to the fourteenth century and indicates a Southern French provenance, but is too generic to rule out a different origin and later date. Matters are different with the decorations and the notula of the marginal corrections and annotations, both of which can be dated and traced to a particular origin with greater confidence. Bernard Bischoff believed that the annotations might well have been written in the second half of the fourteenth century. Gilbert Ouy was similarly confident that the manuscript was copied in the last quarter of the fourteenth century. He was also certain that it was Southern French in origin, not Italian, and that it might well have been written in a place like Toulouse or Montpellier, where it is known to have been owned by a certain M. de Rignac in the seventeenth century before it was sold to Colbert in 1682.

Marie-Thérèse d'Alverny examined the manuscript in person and gave the most detailed response. She judged the style of the decoration and the use of colors, particularly the violet filigrees, to be typical of manuscripts copied in Southern France in the fourteenth century. The notula of the contemporary corrections and marginal notes struck her as unequivocally French, probably Southern French, and dating from perhaps as early as the first half of the fourteenth century. She thought the decoration of the catchwords with pen

drawings at the end of each gathering may be considered evidence of Italian influence, which would not be uncommon at Avignon, but she was also certain that the deep black ink and the angularity of the main script were so thoroughly un-Italian that the manuscript was definitely not Italian in origin. She speculated that the scribe might well have been a northerner working in Avignon or Toulouse. She identified three missals from Southern France—Paris, Bibliothèque Nationale, ms. lat. 828 (from Riez in Provence, 1342–52), ms. lat. 837 (from Toulouse, 1364), and ms. lat. 877 (from Toulon, 1334–42)—as important points of reference because they were copied in a similar script and can be confidently dated to the middle of the fourteenth century.[11] Overall, to the degree that paleographical evidence allows for any firm conclusions at all, she believed that P was copied in Southern France at some point between 1330 and 1360.

Monique-Cécile Garand concurred with Denise Bloch and Marie Thérèse d'Alverny that the script and decorations point to a Southern French origin, and also believed that their hybrid character suggests an Italian influence, as would have been normal in Avignon, where scribes from Italy mingled with scribes from Provence, Languedoc, and even Paris. In terms of dating, she identified three additional but slightly later manuscripts as equally important points of reference. Two are missals from Avignon, Bibliothèque Municipale, mss. 133 and 136, copied under the pontificate of Urban V (r. 1362–70).[12] The third, Bibliothèque Nationale, ms. lat. 5407, contains a part of Bernard Gui's *Speculum sanctorale* and was copied in Avignon in 1378 for Cardinal Guillaume de Chanac (ca. 1320–83), who had become bishop of Mende in 1371.[13] One would dearly like to speculate that Guillaume de Chanac paid the scribe of ms. lat. 5407, or a scribe with the same training, to make the copy of William Durant the Younger's treatise that is preserved in P. As bishop of Mende and servant of the papacy in Avignon, Guillaume de Chanac certainly had good reason to furnish himself with a copy of the treatise on the reform of the church that his predecessor in Mende had written sixty years earlier. Sadly this is no more than speculation.

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11 {Samaran, *Catalogue des manuscrits datés*, 2:33, 35.}

12 {Samaran, *Catalogue des manuscrits datés*, 6:71 and plates LIX, LXI. Cf. Leroquais, *Sacramentaires et missels manuscrits*, 2: 322, 324.}

13 {Samaran, *Catalogue des manuscrits datés*, 2:271 and plate LX. As it happens, there is a town by the name of Chanac on the river Lozère in the county of Gévaudan, about thirteen miles southwest of Mende. However, apart from the name and his service as bishop of Mende from 1371, I have not been able to document any specific relationship between Guillaume de Chanac and the town of Chanac in the Gévaudan.}

Certain though is this: in the expert opinion of scholars familiar with late medieval French manuscripts, P was copied in Southern France before the end of the fourteenth century—definitely long before the Council of Constance met and before the other surviving manuscripts of the treatise were copied. Thus P is not only the sole surviving witness to one of the two main branches of the manuscript tradition of Durant's treatise, but also the only one that can safely be dated to the fourteenth century and traced to Southern France, closer to Durant in time and place than any other. That makes it the single most important source for the text of both the *Tractatus maior* and the *Tractatus minor*.}

Contents:

{The manuscript has no contents other than the complete text of Durant's treatises, i.e., both the *Tractatus maior* and the *Tractatus minor*. (fols. 1^{ra}–91^{vb}) *Tractatus Maior*: (fol. 1^{ra}) Inscription:[14] "›In dei nomine amen. Incipit prima pars.‹" {292 | 293}—(fol. 1^{ra-b}) Prol.: "Scribitur in consilio tholetano, quod bone rei dare consilium. Et presentis vite habetur subsidium . . .—. . . scribendum duxi ea, de quibus iuxta paruitatis mee modulum agendum esse videtur in consilio memorato."—(fols. 1^{rb}–17^{ra}) Part one: "Rubrica prima de correctione eorum que male aguntur premittenda in dei ecclesia a ministris ecclesiasticis in capite et in membris. Et primo siquidem cum dominus dicat in euangelio Jo[hannis] viii. Qui sine peccato est vestrum [John 8:7] . . .—. . . et multe discordie, scissure, scissmata, mala scandala, onera, et dispendia proueniant ex eisdem prout in precedentibus plenius est probatum."—(fols. 17^{ra}–91^{vb}) Part two: "›Incipit secunda pars.‹ Incipit secunda pars istius tractatus, in qua in speciali agitur de hiis que ab antiquo fuerunt spiritus sancti instinctu ab apostolis constituta . . . —. . . lxxx. lxxxi. et ii. vi. vii. viii. et ix. Et in xc. scilicet ut decimas et primicias et alia iura ecclesiastica solvant. ›Explicit secunda pars.‹"—(fols. 91^{vb}–112^{va}) *Tractatus minor*: "›Tractatus Reuerendi in Christo patris domini G[uilelmi] dei gratia Mimatensis episcopi.‹ ›Rubrica prima. De reformatione vniuersalis ecclesie. Et quod in ea est primo a capite, scilicet Romana ecclesia, prelatis et aliis superioribus inchoandum.‹ Sane quantum ad reformacionem vniuersalis ecclesie utilitater [*sic*] et perseuerabiliter ac efficaciter faciendum videtur quod a capite ratio sit edenda . . .—. . . Nam qui in modico fidelis est et supra multa constituitur et intrat in gaudium domini sui. Ad quod nos perducat qui viuit et regnat per omnia secula seculorum. Amen."—(fol. 112^{va}) Colophon: "Ista dictata fuerunt in consilio generali Vienne celebrato

14 {I use single-angle quotation mark to indicate portions of text the scribe set off as a heading.}

per Reverendum patrem dominum G.[uilelmum] dei gratia episcopum Mimatensem."}

See: *Catalogus codicum manuscriptorum*, 3:112; Lauer, *Catalogue général des manuscrits latins*, 2:3.

Bibliography: Viollet, "Guillaume Durant," 79n2, 99n4, 100n2; Rambaud-Buhot, "Baluze," 1:333, 1:333n90. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 6n19, 7n26, 9n35, 295n20, 322.}

History: The first known owner of the manuscript was M. de Rignac, counsellor at the Cour des Aides in Montpellier, whose manuscripts were given to Colbert on 6 February 1682. The list of manuscripts Colbert received contained a *Durandus de modo concilii celebrandi*, as shown by a catalog drawn up by Baluze (Bibl. Nat., ms. lat. 9364, fol. 74^{v}). Since ms. Colbert 2530 is the only Colbertine manuscript of Durant's treatise, it must be identical to the one originating in M. de Rignac's collection. The fact that the manuscript's provenance can thus be traced to Montpellier agrees well with the Southern French style of its decoration. In 1732 the manuscript entered the royal library together with the other Colbertine manuscripts.[15]

***M Munich, Bayerische Staatsbibliothek, Clm 6605**
(*Codex Frisingensis chartaceus 405*)

Description:[16] paper, s. XV, I + 478 fols. {290 × 205 mm. A composite volume consisting of four fascicules, each with its own characteristics, bound in wooden boards covered with undecorated leather. Two clasps and a chain formerly attached to the binding have been removed. The title at the top edge of the book block reads: *contra Judaeos et de conciliis generalibus.* A small label on the spine dating to the time of secularization carries the signature Fris. 405. Beneath it is a label with the old signature of the cathedral library of Freising.[17] The Ex libris of the cathedral library of Freising, dating to ca. 1770, is glued to

15 Cf. Delisle, *Cabinet des manuscrits*, 1:439–86.

16 {The description has been improved on the basis of notes I took in 1977 and correspondence in 2012 with Dr. Bettina Wagner and Dr. Anja Freckmann, Bayerische Staatsbibliothek, Munich, and with Prof. Annalisa Belloni in 2013. I am especially grateful to Dr. Freckmann for sharing the draft of a detailed description of Clm 6605 she prepared in the context of a project aimed at furnishing full descriptions of the paper manuscripts held by the library of the cathedral of Freising until secularization in 1802, and since then by the Bayerische Staatsbibliothek. Most of the description is taken directly from her draft.}

17 {The catalog of the cathedral library of Freising prepared by Anaklet Reiffenstuel and Franz Muttner in 1687 is now held by the Bayerische Staatsbibliothek, Munich, Cbm Cat. 8a; cf. *Mittelalterliche Bibliothekskataloge*, 4/2:623.}

the inside front cover. It shows a haloed Virgin Mary standing on a quartermoon with haloed child in her arms and framed by an aureole.[18] The inside back cover carries a restoration note dated 1958.

At the front of the volume a parchment folio with writing in a gothic minuscule dating to the twelfth century is folded horizontally across the middle and bound into the volume at the fold to form two guard leaves, numbered I–1, with vertically aligned text. A similar parchment fragment with writing in gothic minuscule forms a guard leaf numbered 474 at the back of the volume. The writing on the guard leaves consists of passages from Roman law: fol. I^{r}: Dig. 16.1.32.4–16.2.9.1: "... cauere debet excepcione se non usuram [et] sic ad iudicem ire ... id est non exacturum quod is compensauerit." Fols. I^{v}–1^{r}: Dig. 16.2.10 pr.–16.2.20: "[S]i ambo socii patrem diligenciam [*sic*] societati adhibuimus ... pecuniam iure compensacionis retinere non placuit, quoniam ea non compensantur." Fol. 1^{v}: Dig. 16.1.32.1–16.2.8: "... ne melioris condicionis emptor sit, quam fuerit uenditor ... ne diligencior quisque deterioris condicionis habea[tur, si compensatio ei denegetur]." Fol. 474^{r}–^{v}: Dig. 3.5.5 pr.–3.5.7.2: "... [fidei]ussero, dum michi puto a te mandatum esse ... uerius est quasi re publicata [*sic*] amplius agi contrario iudicio [non posse] ...."

The modern foliation in penciled arabic numerals runs from 1–474. Nineteenth-century foliation in ink is still visible on fols. 134 and 300, and was corrected in pencil to 141 and 305. In the course of re-cataloguing the foliation was revised by numbering the first of the two front guard leaves roman numeral I (since the penciled arabic foliation begins, uncharacteristically, with the second guard leaf counted as fol. 1), and by numbering three previously unnumbered folios 69a, 141a, and 305a. Initial letters, titles, paragraph marks, and underlining of names of authors and/or citations are rubricated.

Fol. 305^{rb} gives Basel as the place where, and 23 August 1336 as the date when, the third fascicule was completed. Judging by the nature of the paper, the watermarks, and the dates when the contents were composed, all four fascicules are likely to have been copied in the late 1430s at the Council of Basel. It is uncertain when and where they were bound into one volume and how they made their way to Freising. The titles entered for the four pieces at fols. 2^{r}, 70^{r}, 142^{r}, and 306^{r}, as well as a note on fol. 85^{v}, were written by a slightly later hand, most likely shortly before or after the fascicules were bound together.

(A) first fascicule, fols. 2–69a. Watermark: a hand with cuff, without additional motif, variant of Piccard online, nr. 154363, documented 1439 in Brunswick.—Gatherings: five sexternions (fols. 2–61), one bifolium (fols. 62–3), and a ternion (fols. 65–9a) with a single leaf (fol. 64) glued to its front.—

18 {Cf. Warnecke, *Bücherzeichen*, 67, nr. 559.}

Justification 220 × 140 mm, divided into two columns of 48–52 lines per page, written in two hands and rubricated.—Hands: (1) bastarda without loops[19] (hybrida libraria),[20] fols. 2ra–5^{rb}, 38ra–69^{vb}; (2) chancery bastarda (cursiva currens), fols. 5va–37^{vb}. There are occasional marginal annotations in later hands, especially in the first half. Fol. 69a is blank.

(B) second fascicule, fols. 70–141a. Watermarks: (1) a raceme with three clusters of berries, variant of Piccard online, nr. 129548 = Piccard, *Wasserzeichenkartei*, Frucht I, 810, documented in 1437; (2) ox head with eyes and nostrils below a single-lined starred pole, Piccard online, nr. 76038 = Piccard, *Wasserzeichenkartei*, Ochsenkopf VII, 558, documented in 1438–39.—Gatherings: a sexternion (fols. 70–81), a quinternion minus one leaf (fols. 82–90), a quinternion (91–100), three sexternions (fols. 101–36), and a ternion (fols. 137–41a). Catchwords at fols. 81^{v}, 90^{v}, 100^{v}, 136^{v}.—Justification 185 × 115 mm in a single column of 39–46 lines.—Hands: (1) chancery bastarda (cursiva currens), fols. 70^{r}–84^{r}; (2) bastarda without loops (hybrida libraria), fols. 84^{v}–91^{v} line 8; (3) bastarda without loops (hybrida libraria), fols. 91^{v} line 8–141^{v}. Rubricated with marginalia by later hands. Fol. 85 is intentionally left blank on front and back. A note on fol. 85^{v} declares "nihil vacat per totum folium." Fol. 141a is blank.

(C) third fascicule, fols. 142–305a. Watermark: a cluster of grapes on a two-lined stem, without additional motif, Piccard online, nr. 129129, documented 1439 in Waldeck.—Gatherings: ten sexternions (fols. 142–261), one septernion (fols. 262–75), two sexternions (fols. 276–99), and an irregular quinternion (fols. 300–5a). The thread visible between folios 304 and 305 in the final gathering suggests that fols. 304–5 were initially the inner bifolium of a complete quinternion that seems to have had four separate leaves (fols. 300–3) glued to fol. 304. Catchwords.—Justification 205 × 140 mm in two columns of 43–8 lines.—Written by three hands in bastarda without loops (hybrida libraria): (1) fols. 142ra–7^{rb}; (2) fols. 147va–238ra line 6; (3) fols. 238ra line 6–305^{rb}. An apparent change of hands from 169va to 169^{vb} is due to an increase in the size of the script. Hand (2) begins with traces of humanist influence (gothico antiqua). Rubricated. Fol. 305a is blank.

(D) fourth fascicule, fols. 306–473. Watermarks: (1) ox head with eyes and nostrils below a single-lined starred pole in two variants: (a) 70 mm high, Piccard, *Wasserzeichenkartei*, Ochsenkopf VII, 551, documented 1431–36 in Basel and Frankfurt; cf. Piccard online, nr. 75968, documented 1433 in Geldern,

19 {Thus in the terminology of Schneider, *Paläographie*.}

20 {Thus in the terminology of Derolez, *Palaeography*, which I will continue to supply in parentheses, in addition to Schneider's.}

and nrs. 75952, 75986, 75990, documented 1441–42 in Basel; (b) 67 mm high, Piccard, *Wasserzeichenkartei*, Ochsenkopf VII, 596, documented 1431–37 in Basel and Frankfurt; cf. Piccard online, nr. 76228, documented 1437 in Geldern; (2) ox head with eyes and nostrils below a single-lined starred pole, 42 mm high, Piccard, *Wasserzeichenkartei*, Ochsenkopf VII, 502–3, documented 1434–37 in Basel and Frankfurt; cf. Piccard online, nrs. 75748–9, documented 1435 in Landau and Basel.—Gatherings: a quinternion minus one leaf (fols. 306–14), fifteen quinternions (fols. 315–464), and a quinternion minus one leaf (fols. 465–73). Catchwords.—Justification 180–5 × 115 mm in one column of 29–32 lines.—Written by two hands in bastarda (cursiva libraria-formata): (1) fols. 306^{r}–461^{v} line 26; (2) fols. 461^{v} line 26–473^{v}. Rubricated. Headers indicating *prima pars*, *secunda pars, tercia pars*. Marginalia in later hands.}

Contents:[21]

{(1) fols. 2ra–69^{vb}: the complete text of Durant's *Tractatus maior* and *Tractatus minor*. (fols. 2ra–57^{rb}) *Tractatus maior*: (fol. 2ra) Inscription: "›Jhesus‹" Title added by a later hand: "›Tractatus Guilhelmi Durandi de reformacione ecclesie vniuersalis‹"—(fol. 2ra) Prol.: "Scribitur in Concilio Toletano quod bone rei dare consilium et presentis [vitae] habetur subsidium . . .—. . . scribendum duxi ea de quibus iuxta paruitatis mee modulum agendum esse videtur in concilio memorato."—(fols. 2ra–11ra) Part one: "›Rubrica prima de correctione eorum que [male] aguntur premittenda in dei ecclesia a ministris ecclesiasticis in capite et in membris.‹ Et primo siquidem cum dominus dicat in ewangelio Jo[hannis] viii^{a}: Qui sine peccato est vestrum [John 8:7] . . .—. . . et multe discordie scissure et scismata mala scandala onera et dispendia proueniant ex eisdem prout in precedentibus plenius est probatum."—(fols. 11ra–57^{rb}) Part two: "›Secunda pars‹ Incipit secunda pars istius tractatus in qua in speciali agitur de hiis que ab antiquo fuerunt episcopis sanctis instituta ab apostolis constituta . . .—. . . lxxxviii et lxxxix et in xc. scilicet ut decimas et primitias et alia iura ecclesiastica solvant."—(fols. 57^{rb}–69^{vb}) *Tractatus minor*: "›Incipit tercia pars Tractatus Reuerendi In Christo patris domini G.[uilelmi] dei gratia episcopi Mimatensis‹ ›Rubrica prima de Reformacione vniuersalis Ecclesie et quod in ea est primo a capite scilicet Romana ecclesia prelatis et aliis superioribus inchoandum‹ Sane quantum ad Reformacionem vniuersalis ecclesie vtiliter et perseuerabiliter ac efficaciter faciendum videtur quod a capite racio sit edenda . . .—. . . nam qui in modico fidelis est supra multa constituitur et intrat in gaudium domini sui, ad quod nos perducat ille qui viuit et regnat in secula seculorum. Amen."—(fol. 69^{vb}) Colophon: "›Explicit tercia pars.‹ Ista dictata

21 {I use single-angle quotation mark to indicate portions of text the scribe set off as a heading.}

fuerunt in Concilio generali Vienne celebrato per Reverendum patrem dominum Guillermum dei gratia Episcopum Mimatensem."

fol. 69a: blank.

(2) fols. 70^{r}–141^{v}: John of Segovia, *De auctoritate conciliorum generalium*, also known as *Tractatus decem avisamentorum*.[22] Title added by a later hand: "›Tractatus magistri Jo[hannis] de Segouia in Hispania de auctoritate sacrorum conciliorum‹" Inc.: "Apud sapientes in decisione questionum ac disputacionum frequencia, necnon per ipsos et alios quoscumque de ecclesia, prout est omnium magistra fidelium, sepe mencio fit in communi sermone . . .—[fol. 85^{rv} is blank except for two lines on fol. 85^{r}, with a comment by the scribe: "Nihil vacat per totum folium."]—. . . inductionis autem huius extitit causa cupiditas sciendi de sanctitate ecclesie et auctoritate generalium conciliorum ex sacra scriptura. Vnde ex hoc impositum est nomen opusculo."—(fol. 141^{rv}) Tabula: "Tractatus decem auisamentorum ex sacra scriptura de sanctitate ecclesie et generalis concilii auctoritate. Decem auisamenta contenta in superioribus sunt hec: Primum, quod ecclesia non predestinatorum solum aut in gratia sistencium, sed est congregacio omnium fidelium in vnitate fidei . . .—. . . et in materia scandali, quod nemo eximitur a judicio etc." The rest of the page is blank.

fol. 141a: blank.

(3) fols. 142ra–305^{rb}: Paul of Burgos, *Dialogus de Judaeis*.[23] {293 | 294} Title added by a later hand: "›Tractatus Burgensis episcopi de Judeis‹"—A further title, "Dialogus Saulus Paulus de Judeis," was added by a still later, most likely seventeenth-century hand.—(fols. 142ra–3ra) Prol.: "Scrutamini scripturas . . . [John 5:39]. Christus volens Judeos instruere circa cognicionem, in qua vita eterna consistit . . .—. . . in custodiendis illis retribucio multa, quam nobis concedat Christus dei filius."—(fols. 143ra–245va) Part 1, dist. 1–10: "Distinctio

22 Cf. Fromherz, *Johannes von Segovia*, 152, nr. 6, for information on this work. {Cf. Belloni, "Iohannes Heller," 56–7; Hernández Montes, "Obras de Juan de Segovia," 275–6, nr. 9; Utz, "Zur Chronologie der kirchenpolitischen Traktate," 304–5, 314; Helmrath, "*Ecclesia enim parva esse potest*," 300–2 and n. 44. The first *avisamentum* was edited by Krämer, *Konsens und Rezeption*, 385–412, with commentary, ibid., 227–41, and the table of contents taken from this manuscript, ibid., 413–15. On the tenth *avisamentum* cf. Black, *Monarchy and Community*, 141–4.}

23 This text goes under varying names, e.g., *Dialogus Pauli et Sauli contra Judaeos, sive scrutinium scripturarum*, or, most frequently, *Scrutinium scripturarum*; see A. L. Willams, *Adversus Judaeos*, 267–76; Hartmann, "Paul of Burgos." The book was printed repeatedly in early modern times: Mantua 1475, Mainz 1478, Paris 1507, 1513?, 1535, and Burgos 1591. {Cf. Miethke, "Konzilien als Forum," 762n85; Reinhardt and Santiago-Otero, *Biblioteca bíblica*, 245–8.}

prima de scrutinio scripturarum, que locuntur de hiis, qui saluandi seu redimendi erant per Christum in lege promissum . . . Capitulum primum sequitur. Saulus ad Paulum. O Paule audiui, quod magister tuus, dum viueret, dicebat magistris nostris: Scrutamini scripturam . . .—. . . ut forte in sequentibus apparebit temerarie recipiebas et sic ad vota tua implendo deo duce procedamus."—(fols. 245va–305^{rb}) Part 2, dist. 1–6: "Incipit secunda pars tractatus de scrutinio scripturarum et est didascalica, cuius prima distinctio, que est quasi continuatiua eorum, que dicta sunt ad dicenda . . ." (fol. 245^{vb}) "Capitulum primum, in quo ponuntur a discipulo quedam argumentaciones contra ea, que dicta sunt de deitate Christi, et petit discipulus earum soluciones ad infidelium confutacionem. Discipulus: Firmiter ardens ea, que per te michi tradita sunt circa deitatem Christi seu Messie . . .—. . . ipse autem mediator dei et hominum homo Christus Ihesus veritas est sine fallacia, bonitas sine malicia, felicitas sine miseria, cui honor et gloria in secula seculorum. Amen."—Colophon: "›Finiui in vigilia Bartholomei in sacro concilio Basiliensi anno xxxvi°‹" (23 August 1436).

fols. 305va–305a^{v}: blank.

(4) fols. 306^{r}–468^{v}:[24] Nicholas of Cusa, *De concordantia Catholica*.[25] Title added by another hand: "›Jhesus‹ ›Prefatio in collectionem Nicolai de Cusa de Catholica concordancia‹"—(fol. 306^{rv}) Prol.: "›Exposcunt agitata sacri huius‹ Basiliensis concilii, que forte nouitate quadam facile aput eos, que [*sic*] modernioribus scribentibus indubiam fidem in [*sic*] eciam in voluntariis prebent . . .—. . . per quam salus eterna et rei publice terrene consistit."—Chapter overviews: (fols. 306^{v}–8^{r}) Part 1, (fols. 308^{r}–12^{r}) Part 2, (fols. 312^{r}–15^{v}) Part 3.—(fols. 315^{v}–37^{r}) Part 1: "Qvia facile scienti fundamenta patescere possunt elicienda, quantum minimo ingenio ex alto dabitur . . .—. . . hec vnio vocatur apud Grecos Synodus, aput nos Concilium, restat nunc de concilio aliqua subnectere."—(fols. 337^{r}–410^{v}) "Incipit secunda pars de Conciliis."—(fols. 410^{v}–68^{r}) "Incipit tercia pars. Si quis ab exordio fundamenta nostro proposito non tam vtilia quam necessaria inuestigare curaret . . .—. . . et ad eternam claritatem tibi et subiectis nostro euo reficiatur in laudem Christi regnantis in secula benedicti. Deo gracia et Marie filio."—(fols. 468^{v}) Colophon: "Finit Collectio de concordancia catholica ex variis veterum approbatis scripturis ad laudem dei omnipotentis, quam ego, Nicolaus de Cusa, decanus sancti Florini Confluentie, decretorum doctor minimus sacro huic Basiliensi concilio cum omni humilitate

24 {In the original version of this article I was misled by Halm, von Laubmann, and Meyer, *Catalogus codicum Latinorum*, 117, nr. 869, to overlook the fact that the *Concordantia Catholica* ends on fol. 468^{v} and that fols. 469^{r}–73^{v} continue with Nicholas of Cusa's *Tractatus de auctoritate praesidendi in concilio generali*.}

25 Cf. Nicholas of Cusa, *De concordantia Catholica*, ed. Kallen. {Cf. Posch, "*Concordantia Catholica*"; Kallen, "Handschriftliche Überlieferung," 44; Izbicki, "Auszüge," 128–9.}

offero nichil in omnibus uerum aut defendendum pro uero iudicans seu asserens, nisi quod ipsa sacra synodus catholicum et uerum iudicauerit, in omnibus ab omnibus orthodoxis corrigi paratus."

(5) fols. 469^{r}–73^{v}: Nicholas of Cusa, *Tractatus de auctoritate praesidendi in concilio generali*.[26] Inc.: "In questione prima de presidencia primo considerandum occurrit, si queritur, quis concilio aut quis in concilio presidere debeat . . .—. . . et synodus nullius efficacie fuit, ut Leo papa ad Theodosium scribit, et aliis multis locis. Deo gracias."}

See: Halm, von Laubmann, and Meyer, *Catalogus codicum Latinorum*, 117, nr. 869.

Bibliography: E. Müller, *Vienne*, 593n28; Fromherz, *Publizistik von Segovia*, 152, nr. 6. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 9n35, 295n20, 322; Belloni, "Iohannes Heller," 56–7; Hernández Montes, "Obras de Juan de Segovia," 275–6, nr. 9; Utz, "Zur Chronologie der kirchenpolitischen Traktate," 304–5, 314; Helmrath, "*Ecclesia enim parva esse potest*," 300–2 and n. 44; Miethke, "Konzilien als Forum," 762n85; Reinhardt and Santiago-Otero, *Biblioteca bíblica*, 245–8; Kallen, *Handschriftliche Überlieferung*, 44–5; Izbicki, "Auszüge," 128–9.}

History: {The paper, the watermarks, the contents, and the date in 1436 when Paul of Burgos's work was copied (see fol. 305^{rb}) make it certain that this manuscript was written in the second half of the 1430s or the early 1440s at the Council of Basel.[27] According to Annalisa Belloni the Basel watermarks, the hands, and the relationship of this manuscript to other manuscripts leave no doubt that it belongs to the substantial group of manuscripts produced and purchased by Iohannes Heller (ca. 1400–78), a jurist trained at the universities of Vienna and Padua, during his activities at the Council of Basel.[28] After returning from the Council of Basel, Heller took his manuscripts to Freising, where he went on to serve as a canon.[29] Like other manuscripts once owned by Heller, this one remained in the cathedral library of Freising until seculariza-

26 {Cf. Nicholas of Cusa, *De auctoritate presidendi*.}

27 {Cf. Belloni, "Iohannes Heller," 56–7.}

28 {Personal communication from Annalisa Belloni. For details see Belloni, "Iohannes Heller."}

29 {It may be worth mentioning Heller's connection to Johannes Grünwalder (after 1392–1452), also a canonist trained in Vienna and Padua, who served as vicar general of Freising, became bishop of Freising in 1440, and is known to have participated in the Council of Basel for long stretches of time in the 1430s and again after 1440. Grünwalder was a determined advocate of the conciliar cause and would have had an obvious interest in Heller's manuscripts. Cf. Meuthen, "Johannes Grünwalder," and Wesche, "Johannes Grünwalder."}

tion in 1802.} Since 1802 it has been the property of the Bayerische Staatsbibliothek.

C = Kues, St. Nikolaus Hospital, ms. 168

Description:[30] paper, s. XV, 212 fols. {290 × 215 mm. Bound in wooden boards covered with brown calfskin tooled with diagonal fillets that form a panel of lozenges surrounded by a border. The lozenges are decorated with animal figures. The border is decorated with rosettes and images of saints. Two metal clasps have been torn off. The back has been repaired in black-brown. There are one parchment cover leaf and two guard leaves in front. The first guard leaf carries a librarian's note in a sixteenth-century hand. The first part is composed of quinternions. The second part, starting with fol. 99, is composed of an irregular variety of different gatherings. There are no watermarks in the first part, thereafter many different watermarks. Written in a variety of fifteenth-century gothic cursive or current bookhands. After fol. 99 the hand changes almost with every piece. Initial letters are colored red.}

Contents:

{(1) fols. 1–95^{v}: William Durant the Younger, parts one and two of the *Tractatus maior*. Inc.: "Incipit liber Guillermi durandi spe[culatoris] | de modo generalis Concilii celebrandi. || Scribitur in Concilio [*capital letters*] || Tholetano quod bone rei . . ." Des.: ". . . et quod cohiberent se a gravaminibus ecclesie. Etcetera - - - || Deo gracias [*capital letters*]." Note that the text breaks off in the middle of a sentence in *Tractatus maior* 2.100, a few lines before the end of the treatise, at the same point as Ma, Tr, B, and R (fol. 51^{vb} line 12 in the edition of Lyon, 1531).[31] A number of passages are underlined and there are marginal notes in the hand of Nicholas of Cusa. On fol. 1^{r} he comments: "Liber iste corrupte multum scriptus est."

fols. 96–8^{v}: blank.

(2) fols. 99–211: an untitled collection of original documents and copies of documents from the Council of Basel probably made at the council by Nicholas of Cusa himself. Most of the items in this collection do not exceed one or two folios in length.

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30 {The description has been improved on the basis of J. Marx, *Verzeichnis*, 155–7. Marx uses single vertical strokes (|) to indicate line breaks, and double vertical strokes (||) to indicate blank lines.}

31 {It is striking that all five copies of the *Tractatus maior* preserved in C, Ma, Tr, B, and R break off at precisely the same point. This confirms the close relationship between them. Cf. Figure 1, below, p. 158, and "Chapter Two: An Analysis of the Textual Tradition," in Fasolt, "William Durant the Younger's *Tractatus*," 54–100, esp. 83.}

(a) fols. 99–100^{v}: *Avisamenta episcopi Conchenensis* (original). Inc.: "Apuntata in concilio constanciensi . . ." Des.: ". . . non committere."

(b) fol. 101: Untitled recommendation regarding expectancies. Inc.: "Ad finem ut papa . . ." Des.: ". . . commodo impetracionis."

(c) fols. 102–4^{v}: *Paterfamilias*. Bull of John XXII concerning chancellery taxes.

(d) fols. 104^{v}–5^{v}: *Execrabilis*. Bull of John XXII. Cf. *Extravagantes Johannis XXII*, 3.1.

(e) fols. 106^{v}–7: *Avisamenta nationis Hispanicae*. Inc.: "Ab yspanis. || Est providendum pater reverendissime . . ." Des.: ". . . a vendicionibus."

(f) fols. 108–10: Untitled draft of a decree against violations of ecclesiastical liberty. Inc.: "Rex regum et dominus dominantium . . ." Des.: ". . . esse voluerunt."

(g) fols. 111–12^{v}: Submission of a canonicus regularis to the president of the council, cardinal Cesarini (original). Inc.: "Reverendissime pater . . ." Des.: ". . . videbitur in predictis. Subscribo."

(h) fol. 114^{r}–^{v}: Alberti Scenk *Avisamentum plurimorum defectuum* (incomplete). Inc.: "Quoniam lamentabilis multorum habet querela . . ."

(i) fols. 115–16^{v}: *Ut detestandum.* Untitled draft of a decree against simony.

(k) fol. 117^{r}–^{v}: *Avisamentum episcopi Placentini*. Inc.: "Quoniam nonulli diversis . . ." Des.: ". . . indicari debere."

(l) fols. 118–24^{v}: Submission of Magister Matthaeus Maynage, Andegavensis dioecesis. Inc.: "Non est etiam . . ." Des.: ". . . remedium adhibendum." Between fols. 121 and 122 there are two smaller leaves entitled: *De contractibus dubiis*.

(m) fols. 126–31: Untitled draft of a decree against simony. Inc.: "Contra labem simoniace pestis . . ." Des.: ". . . in c. Nemo."

(n) fols. 132–3: Untitled submission to the council concerning various issues requiring reform. Inc.: "Festivitates. || Item providendum esset . . ." Des.: ". . . sacrilegium loqui."

(o) fols. 135–47^{v}: Untitled reform statutes of bishop John VI of Liège, dated 4 June 1406. Inc.: "Universis presencia statuta . . . . Quamvis bone memorie . . ." Des.: ". . . duximus apponendum. Datum anno a nativitate domini 1406 mensis Juni die quarta."

(p) fols. 148–50^{v}: *Avisamentum Joannis Pulchripatris*. Inc.: "Sequuntur aliqua super quibus . . ." Des.: ". . . faciliter concurrere." The author, Jean Beaupère (ca. 1380–1463), served as representative of the University of Paris.[32]

(q) fol. 152^{r}–^{v}: *Statuit sancta synodus*. Decree of the council concerning canon law procedure.

32 {Cf. Sullivan, *Parisian Licentiates*, 2:447–52.}

(r) fols. 153–5: Untitled. [*Avisamentum Francisci de cruce*.] The beginning is missing. Des.: "... de parcium consensu procedere."

(s) fols. 156–8: Untitled. [*Statuta reformationis Juliani* (*Cesarini*) *legati in Germania*.] Inc.: "Julianus ... Iniuncte nobis legacionis officii ..." Des.: "... in suo robore duraturis."

(t) fols. 160–1v: *Avisamenta reformationi monachorum nigrorum accommoda*. Inc.: "Quamvis sint aliqua concepta ..." Des.: "... totum cassum erit."

(u) fols. 162–3v: *Abusus provinciae Narbonensis*. Inc.: "Signantur abusus ..." Des.: "... in alia altero."

(v) fols. 166–77v: *Conceptus avisamentorum super reformatione status ecclesiastici*. Inc.: "Ad extirpandas in agro ..." Des.: "... restaurentur."

(w) fols. 178–87v: *De reformatione curiae et officialium eius.* Inc.: "De conciliis generalibus et adversus futura scismata. Quoniam ex obmissione ..." Des.: "... tractaretur die sequenti."

(x) fols. 189–91v: Untitled recommendations against violations of ecclesiastical liberty. Inc.: "Quoniam variis in locis ..." Des.: "... forma dictorum boemorum."

(y) fols. 195–6v: *Avisamentum Nicolai Gee*. Inc.: "Pro aliquali reformacione ..." Des.: "... efficiantur et existant."

(z) fol. 199. Untitled draft decrees for the Council of Ferrara. Inc.: "Ut simul litium tollantur dispendia ..." Des.: "... volumus expedire."

(aa) fol. 200: second copy of the beginning of (2).

(bb) fols. 203–11: *Avisamenta Joannis episcopi Lubecensis de reformatione*. Inc.: "Primo vigilanter insistandum ..." Des.: "... tribuat omnipotens, cui laus sit et gloria in eternum. Amen."}

See: Kraus, "Handschriftensammlung," 54; J. Marx, *Verzeichnis*, 155–7, nr. 168.

Bibliography: Viollet, "Guillaume Durant," 3n4, 79n2, 99n4, 128n1; Vansteenberghe, *Cardinal Nicolas de Cues*, 26n2; Rivière, *Problème*, 368n1; Posch, "Reformvorschläge," 303n2; Lehmann, "Konstanz und Basel," 1:280n2; Nicholas of Cusa, *De concordantia Catholica*, 150, nr. 115**8. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 6–7, 7n71, 9n35.}

History: Since the second part of the manuscript is a collection probably made at the Council of Basel by Nicholas of Cusa himself,[33] it is not unlikely {294 | 295} that Nicholas also acquired Durant's treatise there.[34] The important fact, however, is that this manuscript provides direct evidence for the familiarity

33 See J. Marx, *Verzeichnis*, 157.

34 See P. Lehmann, "Konstanz und Basel als Büchermärkte."

of one of conciliarism's major thinkers with Durant's treatise. The manuscript has been in Cusanus's library since the fifteenth century.

***Ma* = *Paris, Bibliothèque Mazarine, ms. 1687* (*1010*)**

Description:[35] parchment and paper, s. XV, 295 fols. {283 × 203 mm. In the nineteenth century the volume was restored and given a new binding, but the structure of the gatherings remains intact: one parchment folio at the beginning, then a regular sequence of fourteen paper folios and two parchment folios in the remainder of the volume. The sole exceptions come towards the end, at fols. 274–85 (twelve paper folios) and fols. 288–93 (six paper folios). A collation by the Bibliothèque Mazarine's librarian Maslon, dated December 1849 and glued to the guard leaf of the new binding, counts 254 paper folios and 29 parchment folios. There are two decorated initials on fols. 1 and 192, available online at http://liberfloridus.cines.fr/textes/biblio_fr.html. There are no other decorations. The writing is framed.}

This manuscript contains parts one and two of Durant's treatise on fols. 1–82, i.e., all of the *Tractatus maior* except for the conclusion of 2.100. There are occasional marginal annotations in a different hand (fol. 2^{v}, 4^{r}, 4^{v}, 6^{r}, 7^{v}, 8^{r}, 13^{v}, then more rarely). There follows a considerable collection—fifteen pieces in addition to Durant's treatise—of treatises, letters, and occasional writings connected with questions of conciliarism and the authority of church and state. The most important authors are Geoffroy de Mont-Choisi (d. 1436), Antonius de Butrio (1338–1408), Konrad of Gelnhausen (ca. 1320–90), Pope Hadrian IV (ca. 1100–59), John of Paris (ca. 1255–1306), Jordan Brice, and Pope Martin V (ca. 1368–1431).

Contents:

{(1) fols. 1–82: William Durant the Younger, parts one and two of the *Tractatus maior*. Inc.: "Incipit liber Guillelmi durandi spe[culatoris] de modo generalis concilii celebrandi. Scribitur in concilio tholetano quod bone rei dare . . ." Des.: ". . . et quod cohiberent se a gravaminibus ecclesie. Explicit." Note that the text breaks off in the middle of a sentence in *Tractatus maior* 2.100, a few lines before the end of the treatise, at the same point as C, Tr, B, and R (fol. 51^{vb} line 12 in the edition of Lyon, 1531).

35 I am indebted to Pierre Gasnault, Conservateur en chef, Bibliothèque Mazarine, for information about this manuscript. {The description has been improved on the basis of Molinier, *Catalogue des manuscrits*, 2:165–7, information retrieved from http://www.calames.abes.fr/pub/ on 2 February 2013, and correspondence with Isabelle de Conihout, Conservateur en chef, fonds ancien, Bibliothèque Mazarine, in 2013. I am grateful to Isabelle de Conihout for information about the composition of the volume.}

(2) fol. 82:[36] Anonymous writing on the Great Schism and reform in favor of assembling a general council. Inc.: "Qualis fuit status ecclesie in veteri et novo Testamento . . ." Des.: ". . . Per ejus medium excercebatur [*sic*] sive proferebatur."[37]

(3) fol. 90: Geoffroy de Mont-Choisi (d. 1436), abbot of St. Honorat, Lérins (1420–36) and St.-Germain-des-Prés, treatise on the authority of a general council, submitted to the examination of his masters, Jean Bouhale, rector of the school of Angers and Mathieu Hoyau, theologian and canon of Le Mans.[38] Inc.: "Facta est contencio inter discipulos Domini . . ." Des.: ". . . Sub correctione, emendacione et totali examine singularis domini et magistri mei domini scolastici Andegavensis, non solum eximii doctoris, ymo doctorum institutoris, discipulus suus G., abbas Sancti Honorati Lirinensis, talis qualis decretorum doctor."

(4) fol. 97: Another treatise by Geoffroy de Mont-Choisi on conciliar authority, also submitted to Jean Bouhale and Mathieu Hoyau; see fol. 104. Inc.: "Libellus de auctoritate sacri concilii generalis.—Quia video nonnullos de veritate juris . . ."

(5) fol. 105[v]: Various notes on *Qualitates nacionum*, and a decree by the Council of Basel dated 24 April 1439.

(6) fol. 106: Letter from Jean Mauroux (1408–37), titular patriarch of Antioch, to the Council of Basel. Inc.: "Quia nonnulli os suum aperientes . . ." Printed in Labbé, *Sacrosancta Concilia*, 12:912–30.

(7) fol. 120: Anonymous recommendations for the reform of the church. Inc.: "Advisamenta quedam super reformatione ecclesie.—Quia si singulos status ecclesiasticos . . ."

(8) fol. 122: Antonius de Butrio (1338–1408), *Tractatus de schismate*. Inc.: "Incipit tractatus de scismate, domini Anthonii de Butrio.—Reverendissimis in Christo patribus et dominis . . ." Printed from an incomplete manuscript in Mansi, *Sacrorum conciliorum collectio* (1748–52), 3:1041–60.

(9) fol. 172: Konrad of Gelnhausen, *Spes concordie*. Inc.: "Alius tractatulus, eodem scismate durante editus per prepositum Wormacensem, qui intitulatur *Spes concordie.*—Serenissimo principi domino Karolo, regi Francorum gloriosissimo, Conrardus de Gerlenhusen, prepositus ecclesie Wormacensis . . ."

(10) fols. 190–1: Letter from Pope Hadrian IV to Frederick Barbarossa (Jaffé, *Regesta pontificum*, nr. 7121), and the emperor's response. Forged letter from

36 {Here and elsewhere Molinier, *Catalogue des manuscrits*, identifies only the folio on which a given text begins.}

37 {Tr identifies the author of this piece as Theolophorius, possibly identical to Telesphorus of Cosenza; see below, p. 130 and n. 45.}

38 {H. Müller, "Zwischen Konzil und Papst," 268.}

Boniface VIII to Philip IV, and Philip IV's response. Fifteen hexameters on the power of money, inc.: "In terris nummus rex est hec tempore summus . . ."

(11) fol. 192: John of Paris, *De regia potestate et papali.* Inc.: "Tractatus de potestate pape.—Interdum contingit quod vitare . . ." Des.: ". . . Explicit tractatus de potestate papali et regali, et nota quod quidam Augustinensis scripsit contra precentem [*sic*] tractatum." The Augustinian author who criticized this treatise is most likely meant to be Giles of Rome, *De ecclesiastica potestate*.

(12) fol. 243: Letter from King Henry VI to the Council of Basel, dated 14 February 1436, followed by satirical verses posted, according to the scribe's annotation, in the church of Paris.

(13) fol. 244: Decretal of Pope Martin V, dated 24 May 1425. Followed by the treatise of Jordan Brice against cardinal Domenico Capranica (1400–58) that was written at the request of cardinal Pierre de Foix (1386–64) in 1433. Printed on the basis of this manuscript by Baluze, *Miscellanea*, 3:301–50.

(14) fol. 264: Giuliano Cesarini, *Propositio facta in concilio Basileensi, coram ambaxiatoribus regni Bohemie, anno Domini MCCCCXXXIII.* Inc.: "Locuturus pro publica populi Christiani utilitate . . ."[39]

(15) fol. 275: Letter from King Charles VII to the Bohemians. Inc.: "Karolus, *etc*., carissimis in Christo fratribus qui coequalem . . ."

(16) fol. 277: Geoffroy de Mont-Choisi, *Libellus adversus hereses Boemorum*. Inc.: "Pro laboribus multis . . ."[40]

fol. 295 contains the beginning of another copy of William Durant the Younger's *Tractatus maior*.}

See: Molinier, *Catalogue des manuscrits*, 2:165–7, nr. 1687.

Bibliography: Viollet, "Guillaume Durant," 3n4, 79n2, 82n1, 99n4. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 6n19, 7n23, 9n35; H. Müller, *Franzosen*, 267n14, 268nn16–17, 274n42, 276n56, 277n63, 282.}

History: The *terminus a quo* for this manuscript appears to be established by the fifth item (fols. 105^{v}–6), which is dated 24 April 1439. At the end of the fifteenth century the manuscript was in the possession of Louis Pinelle (ca. 1465–1516), rector of the Collège de Navarre since 1497, later chancellor of the University of Paris and bishop of Meaux, where he was succeeded by his

39 {Printed in Mansi, *Sacrorum conciliorum collectio* (1759–98), 29:679–700. See now Christianson, *Cesarini*.}

40 {Dedicated to Nicholas de Chapelle, rector of the school of St. Martin in Tours; see H. Müller, "Zwischen Konzil und Papst," 268. Published by Neumann, *Francouzská Hussitica*, 66–91, in an edition that H. Müller, "Zwischen Konzil und Papst," 264n4, judges to be "sehr fehlerhaft."}

student Guillaume Briçonnet.[41] It is the only text of Durant's treatise for which a direct connection with the University of Paris, one of the centers of the conciliar movement, can be proven. After Pinelle's death the manuscript passed into the library of the Collège de Navarre, where Baluze was able to use it for his edition of Jordan Brice's treatise against cardinal Capranica.[42] At the time of the French Revolution the manuscript entered the Bibliothèque Mazarine.

Tr* = *Troyes, Bibliothèque Municipale, ms. 786
(*ancien fonds Pithou II 52*)

Description:[43] {295 | 296} s. XV, 255 fols. (not 154 as in the catalog). {Bound in tooled leather. The title page carries the notarial mark of the brothers Pierre Pithou the Younger (1539–96) and François Pithou (1543–1621).[44] On fol. 1, there is a large illuminated initial 'S,' contemporary with the writing of the manuscript. It is formed by a green dragon with two small blue and red wings on golden ground. A branch with white leaves extends from the dragon's mouth and fills the space surrounding the dragon's body. On the same page, in the right margin, there is an illumination that covers part of the writing and must thus have been added after the manuscript was finished, possibly much later. It consists of a tree from which a shield is suspended by a red strap. The tree stands on a patch of grass. The green coloring of the leaves of the tree and the grass is similar to the green of the dragon in the illuminated initial. The shield displays a coat of arms on azure with bend gules accompanied by two dragons (amphisteres) with wings or. The dragons' wings are indented, which distinguishes them from the dragon of the illuminated initial.}

Contents:

(1) fols. 1–179: William Durant the Younger, parts one and two of the *Tractatus maior*. Inc: "Incipit liber guillermi durandi spec.[ulatoris] de modo generalis concilii celebrandi. Scribitur in concilio tholetano quod bone rei . . ." Des.: ". . . et quod cohiberent se a gravaminibus ecclesie. Explicit." {Note that the text

41 On Louis Pinelle, see Chevalier, *Bio-Bibliographie*, 2:3762; Du Boulay, *Historia Universitatis Parisienis*, 5:903–4. {See now Sullivan, *Parisian Licentiates*, 2:428–9; Veissière, *Un précurseur*.}

42 See Baluze, *Miscellanea*, 3:301–50.

43 I am indebted to F. Bibolet, Bibliothèque Municipale de Troyes, for a description of this manuscript and information about its history. {The description and the history have been improved on the basis of details provided by F. Bibolet and Hélène Loyau, Institut de Recherche et d'Histoire des Textes, in 1978–80. The Bibliothèque Municipale de Troyes was not able to provide me with information about the composition of this manuscript in 2013.}

44 On the Pithous, see Carreyre, "Pithou."

breaks off in the middle of a sentence in *Tractatus maior* 2.100, a few lines before the end of the treatise, at the same point as C, Ma, B, and R (fol. 51^{vb} line 12 in the edition of Lyon, 1531).}

(2) fols. 179^{v}–95^{v}: A treatise by one Theolophorius[45] and his companion, brother Eusebius, on the state of the church in the Old and New Testaments and the schisms suffered by the church since that time. Inc.: "Qualis fuit status ecclesie in veteri et novo testamento, et qualiter ecclesia fuit recta . . ." Des.: "Talis autem resistentia convenienter fieri debet in concilio generali quod ecclesiam repraesentat."

(3) fols. 196–207^{v}: Treatise by Geoffroy de Mont-Choisi (d. 1436), abbot of St. Honorat, Lérins (1420–36) and St.-Germain-des-Prés, on conciliar authority. Inc.: "Exordium per modum contemplationis. Facta est contentio inter discipulos domini quis eorum videretur esse maior." Des.: "Sub correctione emendatione et totali examine singularis domini et magistri mei do. scholastici andegavensis non solum eximii doctoris immo doctorum institutoris. Discipulus suus G. abbas sancti Honorati Lirinensis talis qualis decretorum doctor."

(4) fols. 208–22^{v}: Treatise by the same author on the authority of a general council. Inc.: "Libellus de auctoritate sacri concilii generalis. Quia video nonnullos de veritate iuris forsitan minus informatos de potestate et auctoritate sacri concilii Basiliensis dubitare . . ." Des.: ". . . quorum correctioni et emendationi premissa omnia submitto. Eorum discipulus G. Lirinesis inter decretorum doctores novissimus."

(5) fols. 223–4^{v}: A short piece entitled *Nota qualitates nationum*, followed by a decree of the Council of Basel. Inc.: "Veritas de potestate concilii generalis . . ." Des.: "In aliis vero quinque sequentibus conclusionibus pro tunc fuit conclusione supercessum."

(6) fols. 225–52: Letter from Jean Mauroux (1408–37), titular patriarch of Antioch, to the Council of Basel. Inc.: "In nomine domini nostri Jesu Christi amen. Sacrosancte generali synodo Basiliensi in spiritu sancto legitime congregate . . ." Des.: "Sed ei iuxta decretum concilii generalis constantiensis et alia supradicta obedire tenetur. Et sic est finis. Laus deo."

(7) fols. 252^{v}–5: Inc.: "Advisamenta quedam super Reformatione ecclesie. Quia si singulos status ecclesiasticos a summo . . ." Des.: "Que vestro coadiuvamine prestet omnipotens deus. Amen."

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45 Theolophorius might well be identical to Telesphorus of Cosenza, whose prophetical *libellus* was widely read in the later Middle Ages. See Reeves, *Influence of Prophecy*, 325–31. I owe this information to Prof. Paul Oskar Kristeller.

A glance at Paris, Bibliothèque Mazarine, ms. 1687, {296 | 297} described immediately above, will reveal that the texts it contains on fols. 1–122^{v} are the same as the contents of this manuscript. The variants appear to be so few that presumably both manuscripts have a common and not too distant ancestor.

See: *Catalogue général des manuscrits des départements* (1849–85), 2:324, referring only to the first item in this manuscript.

Bibliography: Schulte, *Geschichte*, 2:196n4; Potthast, *Bibliotheca historica*, 1:556; Viollet, "Guillaume Durant," 3n4, 79n2, 82n1, 99n4. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 7n25, 9n35.}

History: The manuscript bears the old shelf mark II 52 of the ancien fonds Pithou, but it is impossible to tell whether it was acquired by the older Pierre Pithou (1496–54), his son François Pithou (1543–1621), or François's brother Pierre Pithou the Younger (1539–96).[46] {The coat of arms on fol. 1 looks very much like that of the family Baillet, except that it has a bend gules, not the bend argent otherwise documented for the Baillet.[47] The dragon in the illuminated initial 'S' similarly evokes the arms of the Baillet. That makes it likely that the manuscript belonged to a member of the family Baillet before it entered the library of the Pithou. Potential owners may have been Jean Baillet, bishop of Auxerre (1477–1513), whose coat of arms can be seen in Auxerre, Bibliothèque Municipale, ms. 52, fol. 1, and Thibault Baillet (1483–1525), who served as president of the Parlement of Paris, and whose coat of arms can be found in Paris, Bibliothèque Nationale, ms. français (ancien petit fonds) 23926, in the margin of fol. 6, as well as in Paris, Bibliothèque de l'Arsenal, ms. 848, fol. 1, and Beauvais, Bibliothèque Municipale, ms. 16, fol. 1.[48] The last owner of the manuscript before it entered the library of the Pithou was most likely Pierre Baillet, abbot of the Cistercian monastery of Larrivour near Troyes from 1577 until after 1602 (d. before 1613), whose coat of arms has been described as having, not the bend argent usual for the Baillet, but a bend purple, similar to the gules of the coat of arms on fol. 1 of this manuscript.[49] The proximity of Larrivour to

46 On the Pithous see Carreyre, "Pithou."

47 {Thus according to Hélène Loyau, Institut de Recherche et d'Histoire de Textes, to whom I am very grateful for heraldic information about the Baillet family drawn from the files of the IRHT. By contrast, Rietstap, *Armorial général*, 1:205, who locates the Baillet in the Ile-de-France (as opposed to the Baillet from Burgundy, Belgium, and Brabant), does in fact describe their coat of arms as having a bend gules.}

48 {I am grateful to Hélène Loyau for these details.}

49 {See Le Clert, "Armorial historique de l'Aube," 94, nr. 92. An example can be found on a stained glass window in the cathedral of Troyes. I am grateful to F. Bibolet for this information.}

Troyes and the dates of Pierre Baillet's abbacy make it seem entirely plausible that the brothers Pithou acquired the manuscript from him at some point in the late sixteenth century.}

Pierre Pithou the Younger must have known the book, at any rate, so that there is evidence to suggest a connection between Durant's treatise and the ideas expressed in Pierre Pithou's book *Les libertez de l'Église gallicane* (Paris, 1594). The work of Pierre Pithou may accordingly have furnished a channel through which Durant became known to seventeenth-century Gallicanism and especially to Bossuet.[50] Seeing that Pithou's work has also been called "le texte classique où puisèrent les parlementaires, notamment au XVIII siècle,"[51] one is even tempted to investigate the traces Durant's ideas may have left in eighteenth-century political theory.

After Pierre Pithou's death the library was divided and the part containing manuscript Tr was kept by Pierre's brother François. After the latter's death in 1621, it was donated to the Collège de Troyes that he and his brother had founded. The Collège was, by royal order, turned over to the Oratorians in 1630, who kept the library until 1790. At that date their library was incorporated into the municipal library of Troyes, where it has since then formed the fonds des Oratoriens du Collège.[52]

Tu = Tours, Bibliothèque Municipale, ms. 237 (320; St. Gatien, 202)

Description:[53] vellum and paper, s. XV, 77 fols. {280 × 187 mm. The volume is perfectly preserved with its original binding of wooden boards covered in white sheepskin.[54] There is one guard leaf in front, and two in the back. The text is divided into two columns. Except for colored initials there are no decorations.} The manuscript contains part one of Durant's *Tractatus maior* and part two up to the middle of chapter seventy-one, breaking off in the middle of a sentence {fol. 51va line 10 in the edition of Lyon, 1531}. Inc.: "Incipit liber

50 That Bossuet knew and appreciated Durant was already noted by Viollet, "Guillaume Durant," 123–4.

51 Cf. Carreyre, "Pithou," 2237.

52 Cf. *Richesses de la Bibliothèque de Troyes*, 34.

53 I am indebted to F. Bernier, Bibliothèque Municipale de Tours, for information about this manuscript. {The description has been improved on the basis of details provided by F. Bernier in 1978. Much information was lost in 1940, when the library was burned. The library was closed from 2012–13, which made it impossible to obtain new information about the composition of this manuscript.}

54 {F. Bernier described the manuscript as made of *vélin et papier* (calfskin and paper) and the wooden boards as covered with *peau blanche* (white animal skin). Dorange, *Catalogue descriptif*, 134, nr. 237, identifies the covering as *basane* (sheepskin).}

Guillermi durandi spe[culatoris] de {297 | 298} modo generalis Concilii celebrandi. Scribitur in concilio Tholetano quod bone rei . . ." Des.: ". . . et ore promulgamus ad placiturnam [*sic*] sententiam, simul etiam cum suorum."[55]

See: Dorange, *Catalogue descriptif*, 134, nr. 237; *Catalogue général des manuscrits* (1885–), 37:172, nr. 237.

Bibliography: Schulte, *Geschichte*, 2:196n4; Potthast, *Bibliotheca historica*, 1:556; Viollet, "Guillaume Durant," 3n4, 79n2, 82n1, 99n4. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 9n35.}

History: Concerning the history of this manuscript, it is only known that prior to the French Revolution, when it became the property of the municipal library of Tours, it belonged to the library of the cathedral of St. Gatien, bearing the shelf mark 202.

***B* = *Vatican City, Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487* (*XXVI 24*)**

Description:[56] paper, s. XV, III + 403 fols. {435 × 295 mm. The binding in hard boards covered with yellowed parchment appears to be contemporary. A generic title on the front is written in capital letters datable to the fifteenth century.

Fol. I is a separate leaf with an index written in a fifteenth-century hand. The numbers referring to the contents of the volume are written in roman numerals. The foliation is in arabic numerals. Both can be dated to the fifteenth century. The numbering in the index and the foliation agree with each other.

(A) first fascicule, fols. II–III + 1–8, and 9–78: seven quinternions written in a humanist hand that grows steadily more cursive. Fols. 77^{v}–8^{v} are blank.

(B) second fascicule, fols. 79–156: eight quinternions written in a single humanist bookhand. The quinternion fols. 99–106 is missing the two last leaves. Fols. 105^{v}–6^{v} are blank.

(C) third fascicule, fols. 157–286: thirteen quinternions written in a humanist cursive.

(D) fourth fascicule, fols. 287–312: two quinternions (fols. 287–306), and one ternion (fols. 307–12). Fols. 287–96 are written in cancelleresca by a single hand; fols. 297–312 are written in a humanist cursive by another hand.

55 {It is interesting that the point where Tu ends is very close—less than a column in the edition of Lyon, 1531—to the point where the printed editions begin to differ from the manuscripts; that may not be an accident. For details see below, pp. 178–9.}

56 I am indebted to Miss Adriana Marucchi for a detailed description of the contents and the composition of this manuscript. {The description has been improved on the basis of information provided by Adriana Marucchi in 1978.}

Fol. 287r–v is blank. The arms of cardinal Marco Barbo (1467–91) appear in an illumination on fol. 288.[57]

(E) fifth fascicule, fols. 313–62: five quinternions written in corsiva libraria that becomes steadily more hurried. Fol. 362v is blank.

(F) sixth fascicule, fols. 363–402: four quinternions written in corsiva libraria.

Fol. 403 is a separate leaf.}

The volume forms a unit, but its contents seem to have been written in installments of six fascicules entrusted to different scribes; hence the blank folios at the end of (A) and (E). The contents described below are distributed as follows: (A) nrs. 1–2, one hand, fols. II–78; (B) nrs. 3–5, one hand, fols. 79–156; (C) nrs. 6–15, one hand, fols. 157–286; (D) nrs. 16–20, two hands, fols. 287–312; (E) nrs. 21–2, one hand, fols. 313–62; (F) nr. 23, one hand, fols. 363–402. Judging by the stemma on fol. 288, fascicule (D) must initially have been the property of cardinal Marco Barbo and was only later bound into the present volume as a pre-existing unit. There is no indication of the circumstances in which fascicule (D) or the volume as a whole originated.

Contents:

fol. I: index.

fols. II–IIIv + fol. 1: Tabula sequentis operis (another hand).

(1) fols. 1–38: Ad Eugenium IIII, Fratris Jo. Leonis Rom. O.P. *De synodis et eccl. potestate* (same hand).[58]

(2) fols. 38–77: *Gesta conciliorum ferrariensis et florentini sub Eugenio IV* (same hand).[59]

fols. 77v–8v: blank.

(3) fols. 79–88v: Rodericus Sancius, *Libellus* (sub Paulo II ed.) *de appellatione a sententia Romani pontificis non informati ad se ipsum bene informandum* . . . (another hand).

(4) fols. 89–105: Rodericus Sancius utriusque iuris et artium prof., episcopus Palentinus, castellanus in castro S. Angeli de Urbe, *Libellus de septem questionibus circa convocationem generalis synodi* (same hand).

fols. 105v–6v: blank. {298 | 299}

(5) fols. 107–56v: Rodericus Sancius, episc. Calaguritanus, praefectus in castro S. Angeli de Urbe, *Libellus de remediis afflictae ecclesiae . . . ad card. Bessarionem* (same hand).[60]

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57 Cf. Ruysschaert, "Miniaturistes 'romains'," 261–2.

58 See Kaeppeli, *Scriptores Ordinis Praedicatorum*, 2:469, nr. 2428.

59 Although Kaeppeli, *Scriptores Ordinis Praedicatorum*, 2:470, nr. 2433, s.v. 'Johannes Leonis, *Gesta conciliorum Ferrariensis et Florentini*,' gives no incipits or manuscripts, his entry probably refers to nr. 2 of Barb. lat. 1487.

60 On nrs. 3–5 cf. Trame, *Rodrigo Sanchez de Arevalo*, and Jedin, "Sanchez de Arevalo."

(6) fol. 157: *Exemplum litterarum super indulto concesso imperatori Federico III a Pio II* (another hand).

(7) fols. 157–61v: Dominicus episc. Torcellanus, *Apparatus seu glossae factae ad requisitionem imperatoris Federici . . .* (same hand).[61]

(8) fols. 161v–9v: Dominicus episc. Brixiensis quondam Torcellanus, *Tractatus an sit oboediendum superiori praecipienti revelationem secreti* (same hand).[62]

(9) fols. 169v–88v: P. de Monte, episc. Brixiensis, *De concilio et potestate pontificis* (same hand).[63]

(10) fols. 188v–90v: Nilus, archiep. Thessalonicensis, *Oratio de causa dissensionis inter ecclesiam latinorum et graecorum* Leonello Chieregato episc. Arbense interprete (same hand).[64]

(11) fols. 190v–210: *Collecta et excerpta ex Summa Benedicti abbatis Massiliae contra errores diversos impugnantium fidem catolicam* (same hand).[65]

(12) fols. 210–18v: *Flores sententiarum b. Thomae de Aquino de auctoritate Summi Pontificis* per magistrum Johannem de Turrecremata in concilio Basiliensi a. d. 1437 (same hand).[66]

(13) fols. 218v–28: Petrus de Ancharano, *De laico homicida qui effractis carceribus se promoveri fecit ad sacerdotium* (same hand). {299 | 300}

(14) fols. 228v–52: *Impugnatio pragmaticae Sanctionis Regni Franciae* (same hand).[67]

(15) fols. 252–86v: Nicolaus Siculus, abbas monacensis [i.e., Maniacensis], *Aliqua collecta de potestate pape, concilii etc.* (same hand).[68]

fol. 287r–v: blank.

(16) fols. 288–95v: Dominicus episc. Brix., *Tractatus de reformatione Romanae Curiae ad Pium II* (another hand).[69]

(17) fols. 295v–6: *Expositio psalmi centesimi ad propositum regiminis quod papa servare debet* (same hand).

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61 On nos. 6–7 cf. Jedin, *Studien über Domenico de' Domenichi*, 223 and 275–6, nr. 22.

62 Cf. ibid., 223 and 280–2, nr. 26.

63 Cf. Haller, ed. *Piero da Monte*, *25n59 and *25–*33.

64 The speech in question by Nilus Cabasilas (1298–1363) is printed in the original Greek in Migne, *Patrologia Graeca*, 149:683–700. See Candal, "Opus ineditum Nili Cabasilae," 247–8, and Candal, *Nilus Cabasilas*, 31. On the translation by Leonello Chieregato see Paschini, *Leonello Chieregato*, 38–9, and Angiolgabriello di Santa Maria, *Biblioteca*, 3:CXIX.

65 Perhaps the author in question is Benedict of Veroli; cf. Albanès, *Gallia Christiana novissima*, 2:395–7, and Calendini, "Benoît, évêque de Marseille."

66 See Garrastachu, "Manuscritos del cardinal Torquemada."

67 See Daly, "Some Political Theory Tracts," 89–90.

68 See Lefebvre, "Panormitain," Nörr, *Kirche und Konzil*.

69 See Jedin, *Studien über Domenico de' Domenichi*, 223 and 247–50, nr. 15.

(18) fols. 296–301: *Tractatus de creatione Cardinalium* (another hand begins on fol. 296^{v}).[70]

(19) fols. 301–12^{v}: Dominicus episc. Torcellanus, *Consilium in materia creationis Cardinalium* (same hand).[71]

(20) fol. 312^{v}: Dominicus episc. Torcellanus, *Questiuncula an b. Silvester baptizavit Constantinum* (same hand). {The text breaks off after only eighteen lines. A marginal annotation in another hand explains: "Non mireris si non sequitur quia questiuncula hec posita est in alio loco videlicet in fine libri intitulati Guillelmo de ocham qui appellatur defensorium pacis."}

(21) fols. 313–62: Guilelmus Duranti, *Tractatus de reformatione ecclesiae* (another hand) i.e., parts one and two of the *Tractatus maior*. The title appears only in the index, not here. Inc.: "Guiglelmi mimatensis successoris, alterius guiglelmi qui composuerat [?] speculum iuris. Scribitur in concilio Tholetano quod bone rei . . ." Des.: ". . . et quod cohiberent se a gravaminibus ecclesie. Deo gratias." {Note that the text breaks off in the middle of a sentence in *Tractatus maior* 2.100, a few lines before the end of the treatise, at the same point as C, Ma, Tr, and R (fol. 51^{vb} line 12 in the edition of Lyon, 1531.}

(22) fol. 362: *Epitaphium Guilelmi Duranti* (senioris).

fol. 362^{v}: blank.

(23) fols. 363–403: Dominicus episc. Brixiensis, *Tractatus de inseparabilitate matrimonii* (another hand).[72] {300 | 301}

See: Tomasini, *Bibliothecae Patavinae*, 12–15, nr. VII; Montfaucon, *Bibliotheca bibliothecarum*, 485 D; Garrastachu, "Manuscritos del cardinal Torquemada," 316–17; Hubert Jedin, *Studien über Domenico de' Domenichi*, 223; Daly, "Some Political Theory Tracts," 30, 89–90; Kristeller, *Iter Italicum*, 2:446–7.

Bibliography: Angiolgabriello, *Biblioteca*, 3:CXIX; Sauer, *Symbolik des Kirchengebäudes*, 30n2; Scholz, *Publizistik*, 523 with reference to 210; Paschini, *Leonello Chieregato*, 38–9; Jedin, "Sanchez de Arevalo," 96, 99–100, 101–3, 105, 107–16; Kaeppeli, *Scriptores Ordinis Praedicatorum*, 2:469, nr. 2428. {Black, *Monarchy and Community*, 70nn2–5, 71n2, 72n5, 114n1; 173; Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 9n35; Richardson, *Reclaiming Rome*, 91nn97–8, 92nn100–1, 93n102, 123n103, 137n136, 200n63, 480.}

History: This rich collection of texts is perhaps the most interesting among the manuscripts containing Durant's treatise, although in the literature on William Durant the Younger only Sauer and Scholz appear to have known of its

70 Ibid., 223, 236–41, nr. 12.

71 Ibid., 223, 257–63, nr. 17.

72 Ibid., 223, 283–8, nr. 28.

existence—and Sauer was really writing on William Durant the Elder. Jedin, however, called it a "für die Geschichte der konziliaren Idee ausserordentlich wichtige Handschrift," and the bibliography shows how much attention this manuscript has received.[73] {301 | 302} Unfortunately it seems impossible to trace the ways in which it entered the collection formed by Francesco Barberini (1597–1679).[74] The Barberini manuscripts were acquired by Pope Leo XIII in 1902, which is when this manuscript received its present shelf mark.

***O* = *Vatican City, Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823* (*Bianchini: J.6.10*)**

Description:[75] paper, s. XV. {IV + 219 + 1 fols. A miscellany that must have been assembled after 26 March 1464, the date of the poem by Leodrisio Crivelli (nr. 9, fol. 159), probably in the late fifteenth century. There is one recent paper guard leaf in front (fol. I), followed by three paper leaves contemporaneous to the volume (fols. II–IV). There is one guard leaf in the back (fol. 220). The shelf mark 232 from the library of Guglielmo Sirleto is entered on fol. II.

(A) first fascicule, fols. 1–22b: two quaternions with catchwords (fols. 1–16), and one quaternion lacking its last folio (fols. 17–22 + 22a, 22b). One hand. Fols. 22a–b are blank.

(B) second fascicule, fols. 23–55: one sexternion with catchword (fols. 23–33a + 23a); one sexternion without catchword (fols. 34–45); one quinternion (fols. 46–55). A new hand for fols. 23–53. Fols. 54^{v}–5 appear to be written by the same hand as (A). Fols. 53^{v}–4^{r} and 55^{v} are blank.

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73 See Jedin, *Studien über Domenico de' Domenichi*, 223. {In the original version of this article I went on to claim that Barb. lat. 1487 is identical to manuscript VII in the old library of San Giovanni in Verdara, as described by Tomasini, *Bibliothecae Patavinae*, 12–15. But that claim was mistaken. It was based on a careless reading of Tomasini, who was in fact describing two different manuscripts: one was Barb. lat. 1487, the other was manuscript VII in the old library of San Giovanni in Verdara. Tomasini knew about Barb. lat. 1487 only from a table of contents he had received from Leone Allacci (Leo Allatius, 1586–1669); see above, p. 11 and Miethke, "Nachricht." I have removed the offending passage with its accompanying footnotes in order to avoid further confusion. Note that Montfaucon, *Bibliotheca bibliothecarum*, 485 D, made the same mistake when he referred to a manuscript of Durant's treatise supposedly held in Padua.}

74 On the history of the Barberini collection cf. Ermatinger, "Checklist," 1 (1957): 159; 2 (1958): 41, and Daly, "Some Political Theory Tracts," 28–30, 156–7.

75 I am indebted to Martin Bertram for the shelf mark of this manuscript and Adriana Marucchi for the description. {The description has been improved on the basis of Pellegrin, *Manuscrits classiques latins*, 1:449–50, and details provided by Adriana Marucchi in 1978.}

(C) third fascicule: two gatherings of nine folios each (fols. 55a + 56–72) with catchwords; one binion (fols. 73–5 + 75a). A new hand (fols. 56–66), thereafter another new hand (fols. 67^{v}–74). Fols. 55a^{r}–^{v}, 66^{v}–7^{r}, and 75^{r}–5a^{v} are blank. Note that Pellegrin, *Manuscrits classiques latins*, 1:449, incorrectly considers this fascicule to consist of two distinct fascicules.

(D) fourth fascicule, fols. 75b–108d: one quinternion without catchword (fols. 75b–84; note that the numbering begins with 75b; the preceding fol. 75a is unnumbered); one quinternion without catchword (fols. 85–94); one quinternion with catchword (fols. 95–104); one quaternion (fols. 105–8, 108a, b, c, d). A single hand, which seems to be the same as the hand on fols. 67^{v}–74 in the preceding gathering. Fols. 108a–d are blank.

(E) fifth fascicule, fols. 109–24b: one quaternion (fols. 109–16); one quinternion without catchword (fols. 117–24 + 124a, 124b). Various hands; the hand on fols. 109–10^{v} seems to be the same as on fols. 1–22; the hand on fol. 111^{r}–^{v} appears to be the same as on fols. 67^{v}–74 and 75b–108.

(F) sixth fascicule, fols. 125–59: four quaternions with catchwords (fols. 125–55); one binion (fols. 156–9). A single hand that differs from each of the preceding ones; on fol. 159 the same hand enters the date "Senis VII kal. aprilis 1464."

(G) seventh fascicule, fols. 160–219: five quinternions signed A, B, C, D, and E (fols. 160–9, 170–9, 180–8 + 188a, 189–98, 199–208); one incomplete sexternion (fols. 209–19). Fols. 163–6 must be read in the following sequence: fol. 164, 163, 166, 165. Written in a lightly inclined humanist cursive that differs from each of the preceding hands; on fol. 219^{v} the same hand entered the date "Finitus Rome septimo idus maii 1460."

Note that in terms of their content fascicules (A)–(E) and (F)–(G) form two reasonably coherent units. Fascicules (A)–(E) end with blank pages and are written in a variety of hands, but deal consistently with ecclesiastical and legal issues of contemporary interest, and some of the hands appear in more than one fascicule. Fascicules (F)–(G) reflect an interest in classical antiquity. The two units were evidently bound together by someone with an interest in both kinds of issues.}

Contents:

{(1) fols. 1–22^{v}: *Anonymi praecepta dicendi*.

fols. 22a–b: blank.

(2) fols. 23–53: The first part and, ending in the middle of a sentence, a fragment of the second part of the *Tractatus maior*, up to part 2, chapter 7 (fol. 17^{rb} line 17 in the edition of Lyon, 1531). Inc.: "Incipit liber domini Guillermi Durandi De modo generalis Concillii celebrandi. Scribitur in Concilio toletano quod bone rei dare consilium . . ." Des.: ". . . Nam qui contempnit contempnitur et dolus."

fols. 53^{v}–4^{r}: blank.

(3) fols. 54^{v}–5^{r}: *Compactata Bohemie*.

fols. 55^{v}, 55a^{r}–^{v}: blank.

(4) fols. 56–66: *Nova doctrina suscitata in partibus Bohemie a tempore Concilii Constantiensis contra doctrinam ecclesie*.

fols. 66^{v}–7: blank.

(5) fols. 67^{v}–74^{v}: *Tractatus compendiosus de officio et potestate camerarii apostolici*.

fols. 75–5a^{v}: blank.

(6) fols. 75b–108: *Quaestiones iuris* (De iudicio, De foro competenti, etc.).

fols. 108a–d: blank.

(7) fols. 109–24: *Notae variae in quaestiones iuris*.

(8) fols. 125–57^{v}: *Ps. Orphaei Argonautica, Leodrisio Crivelli interprete*, with a verse preface to Pope Pius II.[76]

(9) fols. 158–9^{v}: *Leodrisii Crivelli Ad thermas petreolas encomium*, {302 | 303} dated in the same hand "Senis VII kal. aprilis 1464."

(10) fols. 160–219^{v}: *Claudiani Carmina*, dated in the same hand (fol. 219^{v}) "Finitus Rome septimo idus maii 1460." (a) *Epithalamium de nuptiis Honorii Augusti* (fols. 160–2^{v}, 164^{r}–^{v}, 166^{r}–^{v}, 165), inc.: "Hauserat insolitos . . ." The preface is missing.—(b) *Panegyricus dictus Manlio Theodoro consuli* (fols. 165^{r}–^{v}, 167–72^{v}).—(c) *In Rufinum* (fols. 172^{v}–88a). The preface to book II is missing.—(d) *De consulato Stilichonis* (book III) (fols. 188a–95), inc.: "[M]aior Scipiades . . ."—(e) *De bello Gothico* (fols. 195–207^{v}). (f) *Panegyricus de sexto consulatu Honorii Augusti* (fols. 207^{v}–19^{v}); fol. 207^{v} contains only the first four lines of the preface. The text starts on the middle of fol. 208.}

See: Montfaucon, *Bibliotheca bibliothecarum*, 189 D, under the rubric "praecipui Codices Bibliothecae Eminentissimi Cardinalis Ottoboni" (ibid., 188) and with the shelf mark T.VI . . . N.10; Kristeller, *Iter Italicum*, 2:426; Pellegrin, *Manuscrits classiques latins*, 1:449–50.

Bibliography: Birt, ed., *Claudii Claudiani carmina*, CXXIII; Smith, "Lodrisio Crivelli," 34, 38. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 7n24, 9n35.}

History:[77] The manuscript is Italian in origin. {Since Lodrisio Crivelli (1412–ca. 1488) is known to have taught and practiced law, not to mention his presence at the Council of Basel,[78] one is tempted to look for evidence that he was the original owner of this manuscript—a humanist with an interest in William

76 {See Gabotto, "Ricerche," and Smith, "Lodrisio Crivelli."}

77 {I am indebted to Adriana Marucchi for information about the provenance of the manuscript.}

78 {See Smith, "Lodrisio Crivelli," 32–4.}

Durant the Younger; unfortunately I know of no such evidence. Around 1550 the manuscript belonged to cardinal Guglielmo Sirleto and carried the shelf mark 232.[79]} Like many of the Ottoboni manuscripts, it later belonged to Giovanni Angelo, duke of Altemps, with whose collection it passed into the library of cardinal Ottoboni.

R* = *Rome, Biblioteca Nazionale Centrale, ms. Fondo Varia 1

Description:[80] paper, s. XV, 314 fols. {285 × 210 mm. Shelf mark Varia 1, chain number 671. I (modern) + I flyleaves in front; IV (numbered 311–14) + I (modern) paper flyleaves in the back. An organic composite volume consisting of three fascicules, bound in plain parchment. The binding has no other marks and probably dates to the seventeenth century. The colophon on fol. 81va identifies 1437 as the year in which the first fascicule was completed.

(A) first fascicule, fols. 1–84: mainly sexternions. The main watermark is an oxhead, difficult to identify. The text is written by one hand in two columns. Frame ruling in color. There are no catchwords. Simple red initials, titles, and marginalia in red. Minor initials are touched with red. Fols. 82^{r}–4^{r} are blank. An epitaph of William Durant the Elder was added by another hand on fol. 84^{v}. There are sparse marginalia by the same hand throughout the entire manuscript.

(B) second fascicule, fols. 85–198: mainly quinternions. The main watermark is similar to Piccard, *Wasserzeichenkartei*, Kronenwasserzeichen, I, 315, documented 1430–32 in Basel. Frame ruling in color. Full-page writing by one hand at thirty-four lines per folio, with large margins. Catchwords are written horizontally in the inner lower corner of the last folio. Simple red initials, and minor initials touched with red. Fols. 197^{r}–8^{v} are blank.

(C) third fascicule, fols. 199–310: quinternions. The main watermark is an oxhead, similar to the one in the first fascicule. Dry-point ruling. Full-page writing in several bastarda hands, with large margins. Catchwords are written horizontally in the center of the lower margin of the last folio, and often cut off.}

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79 {Cf. fol. 321 in the catalog of Sirleto's library, ms. Vat. lat. 6163.}

80 I am indebted to Dr. Martin Bertram, and to U. Morelli of the Biblioteca Nazionale Centrale in Rome, for pointing out to me the existence of this manuscript, and to the latter for additional information from the inventory. {The description has been improved on the basis of correspondence with Dott. Valentina Longo, Biblioteca Nazionale Centrale, in 2013. I am very grateful to Dott. Longo for corrections to the original description and details on the physical make-up of this manuscript.}

Contents:

(1) fols. 1ra–81va: Andreas de Escobar,[81] *Gubernaculum conciliorum*, beginning with a dedication to Giuliano Cesarini. Inc.: "Ad perpetuam Conciliorum generalium memoriam . . ." Des.: ". . . et sancta Romana civitas." The main body of the text inc.: "Quod mundus regitur auctoritate pontificum et regum potestate. In primis pro fundamento . . ." Des.: ". . . vestre beatitudini recommendo semper humillime ad laudem etc. Explicit gubernaculum conciliorum. Scriptum Basilee anno domini M°CCCC°XXXVII. Sacro ibidem durante Concilio."

fols. 82–4: blank.

(2) fol. 84^{v}: *Epitafium D. Guillelmi Durandi episcopi* [senioris] *Mimatensis.* Inc.: "Hic licet egregius . . ." Des.: ". . . hac celebrare capella."

(3) fols. 85–196^{v}: William Durant the Younger, parts one and two of the *Tractatus maior*. Inc.: "Incipit liber Guillermi durandi spe[culatoris] de modo generalis concilii celebrandi. Scribitur in concilio Tholetano . . ." Des.: ". . . cohiberent se a gravaminibus ecclesie. Deo gratias." {Note that the text breaks off at the same point as the versions preserved in C, Ma, Tr, and B, in the middle of a sentence in *Tractatus maior* 2.100, a few lines before the end of the treatise (fol. 51^{vb} line 12 in the edition of Lyon, 1531).}

fols. 197–8^{v}: blank.

(4) fols. 199–310^{v}: Pseudo-Isidore, *Decretalium collectio*. Inc.: "Canones generalium Conciliorum . . ." Des.: ". . . et cuius expeticio erat ante profugium etc. Expliciunt quatuor concilia principalia."

See: *Catalogo dei manoscritti in scrittura latina*, 1:85–6; Kristeller, *Iter Italicum*, 2:120.

Bibliography: Mordek, "Handschriftenforschungen," 630n8.[82] {303 | 304} {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 9n35.}

History: The provenance of this manuscript is uncertain. {An entry in the handwritten catalog of the Fondi Minori states that it is probably from Farfa, but there is no other evidence to substantiate that origin. Like other manuscripts with no clear indication of their provenance, this one was included in the Fondo Varia at the time of the organization of the manuscript collections in the newly founded Biblioteca Nazionale Centrale, after 1873. It was heavily restored in 1958, which makes it unlikely that it still contains any hitherto unnoticed information about previous owners.}

81 Cf. Walters, *Andreas von Escobar*.

82 This manuscript was not used by Hinschius, *Decretales Pseudoisidorianae*, nor is it mentioned by S. Williams, *Codices Pseudo-Isidoriani*. See Mordek, "Handschriftenforschungen," 630n8. I am indebted to Prof. R. Somerville for this reference.

***Z* = *Zurich, Zentralbibliothek, ms. S 204 o* (*523; C . . . ; D 24.2*)**

Description:[83] paper, s. XV, 291 fols. {280 × 210 mm. Bound in wooden boards covered with tooled leather. Two clasps. On the front cover is a parchment label indicating contents and owner: "Ad Bibliothecam Maioris Ecclesie Tigurinae." A note on the inside of the front cover states: "Liber iste Petri Numagen Treveren. continet infrascripta." A table of contents follows. Beneath it are older signatures: 523; C . . . ; D 24.2. The volume is a miscellany of works by St. Gregory, St. Jerome, St. Cyril, St. Augustine, William Durant the Younger, Pierre d'Ailly, Jerome II of Prague,[84] Ludovico Pontano, Peter Nümagen, the Council of Basel, Horace, and Walter Burley. Titles and initials are rubricated. Annotations by Erasmus Fabritius.

Up to fol. 282 the gatherings run as follows: $VI^{12} + 2\,V^{32} + VI^{44} + VII^{58} + 2\,VI^{82} + V^{92} + VI^{104} + III^{110} + V^{120} + IV^{128} + V^{138} + 2\,III^{150} + V^{160} + IV^{168} + 3\,VI^{204} + V^{214} + VI^{226} + VII^{240} + IX^{258} + IX^{276} + III^{282} + \ldots$. The volume is so tightly bound that it is not possible to be certain beyond this point. For the most part the gatherings correspond to the contents. The volume appears to consist of a variety of different fascicules that were prepared independently of each other and only later bound together.}

Contents:

{(1) fols. 1^{r}–109^{v}: *Gregorii Magni opera*: (a) fols. 1^{r}–58^{r}: *Dialogorum libri IIII* (*PL* 77:149–429);—fol. 58^{v} is blank;—(b) fols. 59^{r}–91^{v}: *Regula pastoralis* (*PL* 77:13–128), followed by additions by Peter Nümagen (fols. 91^{v}–2^{r}); Peter Nümagen's colophon on fol. 91^{v}: "Completio huius operis .s. manu petri Numagen . . . Basilea Nonas Augusti Anno orbis creati 6683 Nati dni ihu Xi 1484 [5 August 1484] Pontificatu Dni Sixti IIII . . .";—fol. 92^{v} is blank;—(c) fols. 93^{r}–109^{v}: excerpts from *Expositio super cantica canticorum* (*PL* 79:471–548, 150:1364–70).

fol. 110^{r}–^{v}: blank.

(2) fols. 111^{r}–15^{r}: inc.: "Devota sanctaque et commendabilis gloriosi Hieronimi . . . vita. Hieronimus in opido [*sic*] Stridonis . . ." (*PL* 22:175–84);—there follow: (a) fol. 115^{r}–^{v}: four short excerpts concerning Jerome;—(b) fol. 116^{r}–^{v}: excerpts

83 I am indebted to Dr. A. Schönherr for additional information. {The description has been improved on the basis of Mohlberg, *Katalog der Handschriften*, 85–6. I am also grateful to Rainer Walter, Stv. Leiter der Handschriftenabteilung, who established the composition of the gatherings in 2013.}

84 {A Camaldulensian monk also known as John-Jerome (1368–1440) and not to be confused with the Jerome of Prague who died at the Council of Constance; cf. Hyland, "John-Jerome of Prague."}

from Jerome and Cyril of Jerusalem, inc.: "Hymnum novum decantamus . . ." Cf. Chevalier, *Repertorium hymnologicum*, nr. 8295.

(3) fols. 117^{r}–27^{r}: excerpt from *De trinitate* 1.4, nr. 7–15.38, nr. 51. Inc.: "Luculens et elegantissimus katholiceque confessionis anchora stabilitus Sancti Augustini Yponensis [in *is struck out*] affricane ecclesie Episcopi De summe trinitate deoque vero sermo feliciter incipit: Omnes quos legere potui qui ante . . ." Des.: ". . . sicut procedit de ipso." Printed in *Spicilegium Casinense*, 1:15;—there follow: (a) fol. 127^{v}: inc.: "Oracio fidei: Domine Deus noster . . ." (*PL* 101:1395);—(b) fol. 128^{r}: inc.: "Fides orthodoxa . . . : Credo in unum Deum . . ."

fol. 128^{v}: blank.

(4) fols. 129^{r}–41^{r}: the first part and, ending in the middle of a sentence, a fragment of the introduction to the second part of Durant's *Tractatus maior*, corresponding to the edition of Lyon, 1531, fols. 4ra line 1–13^{vb} line 35. Inc.: "Incipit liber Gwillermi durandi speculatoris et magistri racionalis de modo generalis Concilii celebrandi: Scribitur in concilio Toletano . . ." Des.: ". . . Nempe prout predictus Augustinus in libro confessionum ait."

fols. 141^{v}–4^{v}: blank.

(5) fols. 145^{r}–9^{v}: Pierre d'Ailly, *De reformatione ecclesie*, also known as *De emendatione ecclesie libellus*. Inc.: "Tractatus Card. Camerac. de reformatione ecclesie: De reformatione ecclesie plura . . ." Des.: ". . . pretioso filii sui sanguine redimere dignatus est." Often printed in early modern times, separately as well as in collections, particularly in Gerson, *Opera omnia*, 2:903–16; fol. 149^{v} notes the date of composition and the date of the copy made by Petrus Nümagen: "Scriptum Constancie Anno domini MCCCCXVI die prima mensis Novembris. S. per manum Petri Numagen accoliti Treverensis XI^{o} Kal. augusti, ipso die exemplaris et Christo dilecte Marie Magdalene [22 July 1484]. Anno eiusdem Xi 1484. Anno vero mundi creati 6683."

fol. 150^{r}–^{v}: blank.

(6) fols. 151^{r}–60^{r}: treatise by Jerome II of Prague (1368–1440), not to be confused with his more famous namesake. Inc.: "Invectiva in fedam ac spurcidam Bohemorum sectam. Hoc est corpus meum hec IIII^{or} verba . . ." Des.: ". . . et ad vitam eternam pervenire procurante domino . . ." Prefaced by a dedicatory letter to Prior Albert of the charterhouse in Basel. Inc.: "Exegisti a me . . ." Printed in Mittarelli, *Annales Camaldulenses*, 9:255–802.

fol. 160^{v}: blank.

(7) fols. 161^{r}–8^{r}: Ludovico Pontano, *Tractatus de auctoritate concilii generalis*. Inc.: "Ludovici de Roma juris et legum interpretis celebratissimi de maiestate auctoritatis conciliorum generalium. Reverendissimi patres primum diligenter revolvens . . ." Des.: ". . . ad depositionem procedere possit." Ed. Woelkl, *Lodovico Pontano*, 577–636; cf. Zurich, Zentralbibliothek, ms. F 49, nr. 7, fols. 145^{r}–50^{r}.

fol. 168^{v}: blank.

(8) fols. 169^{r}–208^{v}: Petrus Numagen, *Gesta Andreae Zamometič*. Inc.: "Gesta archiepiscopi Craynensis in facto indictionis concilii per Petrum Numagen Treverensem descripta . . . : Canit non arte dulciter Philomena . . ." Des.: ". . . grata referentes dominis nostris nuncia." Printed in Hottinger, *Historia ecclesiastica*, 4:355–93; cf. Zurich, Zentralbibliothek, ms. F 49, nr. 9, fols. 159^{r}–69^{v};—fols. 209^{r}–12^{r} are blank;—there follows: fols. 212^{v}–13^{v}: inc.: "Andreas . . . Archiepiscopus Crayensis . . . dno Casparo, Ep. Basileensi: Accedat homo ad cor altum . . ." Des.: ". . . in die vindictae Dei." Printed in Hottinger, *Historia ecclesiastica*, 4:593–604; cf. Zurich, Zentralbibliothek, ms. F 49, nr. 9, fols. 188–90.

fol. 214^{r}–^{v}: blank.

(9) fols. 215^{r}–69^{v}: acts of the Council of Basel; cf. Zurich, Zentralbibliothek, ms. F 49, nr. 10, fols. 190^{v}–219^{r}: (a) fol. 215^{r}: edict of the Council of Basel dated 26 June 1434, inc.: "Sacrosancta generalis sinodus Basiliensis . . . : Ad magnam ecclesie catholice utilitatem . . .";—fols. 215^{v}–16^{v} are blank;—(b) fols. 217^{r}–18^{r}: inc.: "Modus observandus in sessionibus generalium conciliorum more concilii Constantiensis: Primo in loco . . ." Des.: ". . . in consuetis habitibus abeunt";—there follows: fol. 218^{r}–^{v}: inc.: "Miraculum horrendum Sancti Hilarii Pict. in leonem papam: Africana heres . . .";—(c) fol. 219^{r}: inc.: "Sacrosancta generalis sinodus Basiliensis . . . : Cum inter cetera pietatis opera . . .";—fol. 219^{v} is blank;—(d) fols. 220^{r}–3^{r}: various documents of January 1433 concerning the Bohemian and Moravian delegations sent to the Council of Basel, including on fol. 222^{r}: "Mandatum Rectoris et Universitatis Studii Pragensis"; fol. 223^{r}: "Mandatum regni Bohemie Civitatis Pragensis et marthionatum Moraviae";—fol. 223^{v} is blank;—(e) fols. 224^{r}–37^{r}: inc.: "Sequuntur decreta sacri Basiliensis concilii, per ecclesiam Gallicanam in Congregacione Bituricensi sub Karolo VII Francorum rege acceptata, quam vocant Pragmaticam sanctionem: Karolus Dei gracia Francorum Rex . . . : Inscrutabilis divine altitudinis providencia . . .";—fols. 225^{r}–^{v}, 227^{v}–9^{r}, and 237^{v}–40^{v} are blank;—(f) fols. 241^{r}–56^{r}: excerpts of negotiations between the Council of Basel and Pope Eugenius IV (1432–33);—fols. 245^{r}–^{v} and 256^{v}–8^{v} are blank;—(g) fols. 259^{r}–62^{r}: documents concerning the participation of the Greeks in the Council of Basel;—fol. 262^{v} is blank;—(h) fols. 263^{r}–9^{v}: inc.: "Sequuntur obsceni errores quibus a veritate katholica infelicissimi Greci aberrant: Primus error, quod spiritus sanctus procedat . . . "; twenty-four points.

fols. 270^{r}–4^{v}: blank.

(10) fols. 275^{r}–85^{r}: Horace, *Ars poetica*. Inc.: "Oracii Flacci Venusini de arte poetica liber foeliciter incipit: Humano capiti . . ."

(11) fols. 285^{r}–91^{r}: Walter Burley, *De vita et moribus philosophorum* (*De philosophis*). Inc.: "Thales Milesius asianus . . ." Des.: ". . . nec illi Asinos nec ego eos curo." Printed in Burley, *Gualteri Burlaei Liber*, 2–148.}

See: Mohlberg, *Katalog der Handschriften*, 85–6, nr. 217. {Germann, *Reformierte Stiftsbibliothek*, 279.}

Bibliography: Bänziger, *Beiträge*, 63. {Fasolt, "William Durant the Younger's *Tractatus*," 54–100; Fasolt, *Council and Hierarchy*, 5n15, 7, 7n22, 9n35.}

History: This is the most recent manuscript in this survey. It was written by Peter Nümagen or Neumagen of Trier (ca. 1450–1515), who acted as secretary of the council which Andrea Zamometič attempted to assemble in Basel in 1482.[85] The manuscript must have been completed in August 1484 or later (see fols. 91^{v}, 149^{v}). {Nümagen became chaplain of St. Leonhard outside of Zurich in 1488, notary and scribe of the Grossmünster in 1494, and was commissioned by the bishop of Konstanz to manage lawsuits related to marriage until 1502. Before his death in 1515 he sold his books to the library of the Grossmünster.} That library was absorbed into the Kantonsbibliothck in the nineteenth century, which in turn was united with the Zentralbibliothek in 1914.

X

Was there a manuscript of William Durant's treatise in the papal library of Avignon? We know from the correspondence between John XXII and the {304 | 305} king and queen of France on the occasion of Durant's temporary conflict with the pope in 1318–19, that Durant had, to say the least, incurred the displeasure of Clement V at the Council of Vienne, when Clement heard of Durant's book and the proposals he made in it.[86] But John XXII also tells us that Durant pretended to make up for his behavior and dedicated the book to Clement V.[87]

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85 On Peter Nümagen see Schlecht, *Andrea Zamometič*, 125–7, 140–7; Bänziger, *Beiträge*, 57–63; Haubst, *Studien*, 23–6. {Germann, *Reformierte Stiftsbibliothek*, esp. 136–7, 164n96; Achnitz, *Deutsches Literaturlexikon*, 3:1009–10.}

86 John XXII, *Lettres secrètes*, 1:737–41, nrs. 849, 850. On the entire incident see also Haller, *Papsttum und Kirchenreform*, 58–60; Viollet, "Guillaume Durant," 29–30; E. Müller, *Vienne*, 592–5.

87 John XXII, *Lettres secrètes*, 1:739, nr. 849: "In consilio siquidem Viennensi, contra felicis recordationis Clementem papam quintum, predecessorem nostrum, cui ipsum fidelitatis vinculum astringebat, scisma suscitare voluit et temptavit librum contra ipsum et Sedem hujusmodi, sicut notum est fratribus nostris qui tunc aderant et multis aliis, fabricando, et demum cum hec ad prefati predecessoris nostri notitiam pervenissent, librum ipsum cum humilitate apparenti maxima, eidem predecessori nostro, petita venia, assignavit sicut sciunt qui reconciliationem hujusmodi procurarunt."

This suggests that there may have been a copy of the *De modo generalis concilii celebrandi* in the papal library almost as soon as the book was written.

Unfortunately the fourteenth-century catalogs of that library contain no entry that would unquestionably confirm this conjecture. In the catalog made in 1375 at the command of Gregory XI, however, we do find the following entry at nr. 1201: *Consilia generalia et institutiones domini Guillelmi episcopi Mimatensis*.[88] There is no such work on record, either by the older or by the younger Durant. Ehrle, it is true, identified these *Consilia generalia* with the *Instructiones et constitutiones* by William Durant the Elder,[89] a book mainly concerned with the diocesan clergy and intended to provide the bishop with guidance on how to instruct his subordinates.[90] Ehrle's identification may be correct: there is in fact a copy of the *Instructiones et constitutiones* entered with its (almost) exact title as nr. 1161 into the same catalog of 1375.[91] Nevertheless, it is not certain that Ehrle was right. Though nr. 1201 bears a title that could be taken to refer to the elder Durant's *Instructiones et constitutiones*, it is surrounded by works that are quite different {305 | 306} in character from the *Instructiones et constitutiones,* and much closer to a work such as the *De modo generalis concilii celebrandi.* More specifically, the eight works surrounding nr. 1201 on either side are by Giles of Rome (ca. 1243–1316), Alexander of San Elpidio (1269–1326), Augustinus Triumphus de Ancona (1243–1328), and by anonymous authors under such titles as *Liber de primatu romane ecclesie, Parvus libellus de ecclesiastica potestate, Canones et decreta . . . in valde pulcro volumine, Liber diversorum consiliorum sanctorum patrum,* and *Liber canonum.* The entire section in which all of these works are found is entitled *tabula librorum . . . romanorum summorum pontificum et imperatorum et de ecclesiastica potestate cum sermonibus de dominicis et festivitatibus.* Judging by the contents of William Durant's treatise, it would have fitted well into the place of nr. 1201.

One should also remember that the title of nr. 1201 does by no means preclude its identification with the *De modo generalis concilii celebrandi*, even

88 Ehrle, *Historia*, 527, nr. 1201.

89 Ehrle, *Historia*, 527n283, refers to ibid., 525, nr. 1161, which is undoubtedly identical to William Durant the Elder's *Instructiones et constitutiones*. In the index, however, Ehrle, *Historia*, 567, nrs. 1161 and 1201 are both identified as "Guillelmus Durandus episcopus Meldensis [*sic*] de concilio, nr. 1161, 1201."

90 The book by the elder Durant was edited by Berthelé and Valmary, *Instructions et Constitutions de Guillaume Durand le Spéculateur*. There also remain a few undated incunabula of this work together with additions to it made by William Durant the Younger. These additions are only known through the incunabula. See Viollet, "Guillaume Durant," 75–9, esp. 75n5, 76n1; Falletti, "Guillaume Durand," 1057–60.

91 Ehrle, *Historia*, 525, nr. 1161.

though the word *institutiones* in the title seems to have led Ehrle to identify it as Durant the Elder's *Instructiones et constitutiones*. The eventual title of Durant's treatise on the councils is not documented before the fifteenth century, and even then there was some uncertainty: sometimes there was no title at all;[92] sometimes *De reformatione ecclesie universalis* was added in a later hand;[93] sometimes it was *De modo generalis concilii celebrandi*.[94] There is no reason to believe that the treatise may not have been called *Consilia generalia et institutiones* at some time in the fourteenth century.

Unfortunately the evidence is too slim to allow any definite conclusions. One is left with the possibility that there was a copy of Durant's treatise in the papal library in Avignon, but that is all one can assert with confidence.[95]

2 The Printed Editions

A few words ought to be said about the printed editions, of which there were several in the sixteenth and seventeenth centuries.[96] Jean Crespin (Joannes Crespinus), who produced the editio princeps of Lyon, 1531, explained in his preface (fol. 2^{r}–^{v}) how he found a manuscript containing the *De modo generalis concilii celebrandi* in a library which unfortunately he did not identify. Realizing the bad state of his text, Crespin began to look for additional manuscripts, but had failed to find any when an acquaintance of his—again no names are mentioned—provided him with another copy, "exemplar paulo emendatius." As he says himself, Crespin made a considerable effort to establish a good text, but one of his manuscripts, or both, must have contained the chapters in that confused order which has been mentioned in the introduction to this survey, an error that Crespin was unable to correct and {306 | 307} which

92 P, M, and B give no title to Durant's treatise in the text. {Note that P and M are the oldest and best manuscripts, as well as the only witnesses to the *Tractatus minor*}.

93 In M and in the index of B.

94 Thus by manuscripts C, Ma, Tr, Tu, O, R, and Z. {Note that these are the latest manuscripts, that none of them contain the *Tractatus minor*, that C, Ma, Tr, and R seem particularly closely related to each other, and that Tu, O, and Z contain only fragments of the *Tractatus maior*. That leaves very little doubt that the title *De modo generalis concilii celebrandi* was not given to the treatise until the Council of Basel, and that its usage spread from there.}

95 {For information about a manuscript in Benedict XIII's Bibliotheca Minor see below, pp. 285–6.}

96 {See now Fasolt, *Council and Hierarchy*, 7–9; and below, chap. 6, pp. 287–90.}

was continued by the subsequent editions.[97] It is of course possible that the confusion arose only in the printed edition, but it is very hard to believe that it should then have escaped the attention of Crespin. If, as seems likely, it already existed in the manuscript(s) used by Crespin, it is also fair to say that he did not use any of the manuscripts considered in this survey as the basis for his text.[98] But the vitiated order of chapters is not the only characteristic of Crespin's edition for, by identifying the author as William Durant the Elder, often also called the Speculator, it perpetuated a mistake which is not uncommon in the manuscripts.[99] On the basis of these two misjudgments, which are repeated by all other printed editions examined up to date, one may say that the edition of 1531 became the starting-point for all later editions.

In 1534 the edition of 1531 was reprinted in Lyon, only the frontispiece being changed. In 1545 the book was edited by the jurist Philippe Le Preux (Philippus Probus) in Paris, whose reason for so doing was the convocation of the Council of Trent.[100] In 1549, again in Lyon, the treatise was edited in a collection of works devoted to civil law.[101] Summaries of each chapter were added by an editor and placed in front of each chapter heading, thereby facilitating the search for individual proposals. Another edition followed in Venice, 1562. Durant's treatise was also included in the great collection entitled *Tractatus universi iuris*, Venice, 1584,[102] where the summaries found in the edition of Lyon, 1549, were repeated. The last edition to be mentioned is a reprint of Philippe Le Preux's edition of 1545 in Paris, 1671. This, along with the text in the *Tractatus*

97 Since chapters 2.72–99 were moved from the second part of the manuscripts to the third part of the printed editions, chapter 2.71 is immediately followed by chapter 2.100 in the printed editions. This incongruous proximity is faithfully reproduced until 1671 when '2.100' was considered an obvious mistake and renumbered '2.72,' whereby one more indication of the true order of chapters was obliterated. To avoid complications, chapter 2.100 has been equated with chapter 2.72 in the introduction to this article.

98 {To be more precise, he did not use any of the manuscripts containing the full text of the *Tractatus maior*. He might of course have used one of the three fragmentary manuscripts Tu, O, or Z, for none of these would have allowed him to see how the *Tractatus maior* ought to have continued after chapter 2.71. It seems distinctly possible that he used Tu, both because it was available in France and because it broke off just before the point where Crespin's edition begins to differ from the manuscripts; cf. below, pp. 178–9.}

99 C, Ma, Tr, Tu, R and Z unquestioningly identify the author as the Speculator, and only B states explicitly that William Durant the Younger was the author of this treatise.

100 See his preface to the edition. There are two identical editions of Paris, 1545, one printed by Poncet Le Preux, the other by Galliot du Pré (Galeotus Pratensis, Galeotus a Prato).

101 *Tractatus ex variis iuris interpretibus collecti* (1549), 2:88^{v}–117^{v}.

102 *Tractatus universi iuris* (1584–86), 13/1:154–82^{v}.

universi iuris and that of 1545, is the most widely used edition, in part because it was photographically reprinted in 1963(?).[103] {307 | 308}

3 Conclusions

What conclusions may be drawn from the history of Durant's book? It seems obvious that the third part of the treatise played a minor role in the influence Durant may have exercised on the conciliar movement, since it is preserved in only two copies, P and M. Parts one and two {that is, the *Tractatus maior*} form a self-sufficient whole and all of the arguments found in part three {that is, the *Tractatus minor*} can be traced back to the first two. Part three was not really needed by someone looking for political or ecclesiological arguments.

In manuscript Z, which contains only part one with most of the important theoretical material, we may observe that at this late time interest seems to have narrowed further. The numerous proposals in the second part regarding certain, often very specific 'abuses' were perhaps no longer interesting enough to be copied in their entirety by a humanistically trained scribe such as Peter Nümagen who was looking for generally applicable principles.

It is also striking that all manuscripts {other than P} date from the fifteenth century, and that most of them must have been copied at the time of the Council of Basel or later in the fifteenth century.[104] There remains, in other

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103 *Tractatus de modo generalis concilii celebrandi* (Paris: Apud Franciscum Clousier, 1671, reprinted London: Gregg Press [n.d. (1963?)]). It should perhaps also be mentioned that parts of chapter 2.70 are printed in Marca, *De concordia sacerdotii et imperii*, 445–6, 467, and the entire chapter 1.5 (in the form of the edition of Paris, 1671) in Du Boulay, *Historia Universitatis Parisienis*, 4:130–8.

The following is a list of editions that are mentioned in the secondary literature but could not yet be verified either in the library catalogs of great collections or by other means {and are almost certainly 'ghosts' owing their seeming existence solely to typographical errors}. In each case the earliest available reference is given:

Paris, 1561: Viollet, "Guillaume Durant," 79n2.

Paris, 1572: Naz, "Guillaume Durand," 1014.

Paris, 1617: Potthast, *Bibliotheca historica*, 1:556.

Paris and Venice, 1617: Viollet, "Guillaume Durant," 79n2.

Paris, 1635: Potthast, *Bibliotheca historica*, 1:556.

Paris and Venice, 1635: Viollet, "Guillaume Durant," 79n2.

Paris, 1638: Posch, "Reformvorschläge," 189n2.

104 The printed catalogs do indeed date P into the fourteenth century; see P, section 'description.' But Viollet, "Guillaume Durant," 99n4, calling this a "texte détestable," relegates the manuscript to the fifteenth–sixteenth centuries. The manuscripts which may be said to

words, no trace of the paths by which the book was transmitted to the fifteenth century {other than P}, and no record of its influence, if, in fact, there was one, at the Council of Constance.[105] Even assuming that many manuscripts have been lost, it still seems fair to say that the Council of Basel revived interest in Durant's book, and that his real influence has to be sought in that period.[106] But if on the basis of the manuscript tradition {308 | 309} a real interest in Durant's ideas cannot be documented before the Council of Basel, the printed editions do allow one to assert that, once awakened, interest continued to exist for well over two hundred years, particularly in France and in Gallican circles.

Concerning the geographical distribution of the manuscripts it may be noted that none are to be found in Spain, England, and Scandinavia, France has the greatest number (four), Italy furnishes three,[107] the Swiss manuscript belongs to the tradition of the Council of Basel and the futile attempt to revive it in 1482, and Germany has two manuscripts. The geographical distribution of the manuscripts thus agrees well with the areas where the conciliar movement itself was prevalent.

{It may be useful to conclude with an overview of the various titles given to Durant's writing in the manuscripts and the printed editions. As far as we can tell, Durant himself gave it no title at all. In the body of the text, however, at the beginning of the preface to part two, he referred to the *Tractatus Maior* as a *tractatus*. Unfortunately there is no comparable evidence for the *Tractatus minor*. The colophon refers to the *Tractatus minor* simply as *ista*. *Tractatus* thus is the only term of which we can confidently say that Durant used it to describe his work.

P, our best witness, also refrains from giving any title to Durant's writing. The same is true of M and B, except that in both of these manuscripts titles were added by later hands. In M, the added title is *Tractatus Guilhelmi Durandi de reformacione ecclesie vniversalis* and appears at the beginning of the text. In B the added title is *Tractatus de reformatione ecclesiae*, but appears only in the index.

The other seven manuscripts—C, Ma, Tr, Tu, R, O, and Z, all of which can be dated to the Council of Basel or later, and none of which contain the *Tractatus*

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have some connection with the Council of Basel are: M, C, Ma, Tr, B, R and Z, that is seven out of a total of ten. {I now believe that Viollet was wrong. There are compelling reasons to date P into the second half of the fourteenth century; see above, pp. 113–15.}

105 {For the reception of Durant's work in general and at Constance in particular, see below, chap. 6.}

106 {Cf. Miethke, "Konzilien als Forum der öffentlichen Meinung," and P. Lehmann, "Konstanz und Basel als Büchermärkte."}

107 {Here I have removed observations based on my erroneous attribution of B to Padua.}

minor—agree in referring to the treatise as *Liber Guillelmi Durandi speculatoris de modo generalis concilii celebrandi*. It thus seems more than likely that it was someone at the Council of Basel who was responsible for canonizing the misattribution of William Durant the Younger's work to the Speculator and giving it the title *Liber de modo generalis concilii celebrandi*.

The editio princeps by Jean Crespin in 1531 reproduces the title invented at the Council of Basel, but omits *liber* and replaces it with *tractatus*. The title above the frontispiece calls it simply *De modo generalis concilii celebrandi*. The more elaborate title below the frontispiece calls it *Celeberrimi, acutissimique, ac iuristarum facile principis domini Guillielmi Durandi speculatoris, Mimatensis praesulis meritissimi, De modo generalis Concilii celebrandi tractatus, in generali Viennae concilio Claementis quinti Pon. Max. iussu aeditus, at nunc primum aeneis Typis missus.* Jean Crespin thus recognized that Durant had called his work a *tractatus* and preferred it to the manuscripts' *liber*, but placed it at the end of the title.

Philippe Le Preux in 1545 was the first to give the book the title by which it has been known ever since: *Tractatus de modo generalis concilii celebrandi*. This form of the title was reproduced in each of the later editions and in the scholarship. For the sake of simplicity this probably remains the best title to use in any references to the printed editions.}[108]

108 {There are several variants. The editions of Lyon, 1545, and Venice, 1562, call it *Tractatus de modo generalis concilii celebrandi per R. P. D. Guillermum Durandi iuris Speculatorem nuncupatum*. The editions of Lyon, 1549, and Venice, 1584, call it *Tractatus Guilielmi Durandi Speculatoris de modo generalis concilii celebrandi* or, in the index to the edition of 1584, *De modo celebrandi generalis concilii Gulielmi Durandi*. The edition of Paris, 1671, calls it three different ways: on the title page it is *Tractatus de modo generalis concilii celebrandi per Guillelmum Durandum, Episcopum Mimatensem Iussu Clementis quinti summi Pontificis editus, & Concilio Viennensi oblatus*; on sig. iiii it is *Tractatus de modo generalis Concilij celebrandi, per R. P. D. Guilelmum Durandum, Juris Speculatorem nuncupatum, Mimatensem Episcopum, mandato foelicis record. Clementis Papae V. Concilium Viennense celebraturi, editus*; and on sig. iiii^{v} it is *Tractatus de modo generalis concilij celebrandi, per Guillelmum Durandum Mimatensem Episcopum, &c.*}

CHAPTER 2

A New View of William Durant the Younger's *Tractatus de modo generalis concilii celebrandi*

The work which is the subject of this article marked a major advance in the history of medieval political thought. Its significance, although perhaps not widely enough perceived, is well known to scholars specializing in the origins of conciliarism.[1] This is not to suggest that William Durant the Younger's

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I would like to express my gratitude to John H. Mundy, Louis B. Pascoe, S. J., and Robert Somerville for their help in the writing of this article. Since I have used manuscript evidence to supplement the printed editions, it may be helpful to explain the method I follow in quoting from the *Tractatus de modo generalis concilii celebrandi.* Quotations are based on the editio princeps by Jean Crespin, Lyon, 1531. Variant readings are set off by angle brackets, followed by square brackets with the siglum of the manuscript from which they are taken. Quotations are followed by an indication of the book (*Tractatus maior* or *Tractatus minor*) and the part and chapter (or 'rubric') of the *Tractatus maior* or the chapter of the *Tractatus minor* as numbered in the manuscripts, followed by square brackets with the number of part and chapter in the editio princeps whenever this differs from the manuscripts, as well as the folio, column, and lines in the editio princeps, with r and v standing for recto and verso, and a and b for the first and second columns, e.g., *Tractatus maior* 1.4, fol. 7ra lines 40–3, *Tractatus maior* 2.96 [3.27], fol. 58va lines 9–19, *Tractatus minor* 9 [3.32], fol. 62^{vb}, lines 16–26. Durant's references to canon law will be given in their original form, followed by the modernized form in square brackets; cf. Ochoa and Diez, eds. *Indices canonum*, v; Brundage, "Appendix I." Other material added by the present writer will be put in square brackets.

1 See the judgment of Tierney, *Foundations*, 190, 196, that Durant's treatise was a "really very considerable contribution to the growth of conciliar thought," which "strikes for the first time the authentic note of the Conciliar Movement properly so called." The bibliography on William Durant reflects the different contexts in which he has been studied by historians. The best biographical essay is Viollet, "Guillaume Durant." Scholars who have come to deal with the bishop of Mende because of their interest in the reform-legislation of the Council of Vienne include Heber, *Gutachten*, 40–56, 64–74; E. Müller, *Vienne*, esp. 587–8, 591–610; Lecler, *Vienne*, esp. 38–50; Bellone, "Cultura e studi"; and Vereecke, "Réforme de l'église." Their attention to the developments in political thought around the turn of the fourteenth century led the following to discuss William Durant in some detail: Scholz, *Publizistik*, 208–23; Haller, *Papsttum und Kirchenreform*, 58–66, 70; Rivière, *Problème*, 363–9; and Posch, "Reformvorschläge." Durant's relationship to Gallicanism motivated Martin, *Origines du Gallicanisme*, 1:92, 357, 2:31, and Torquebiau, "Gallicanisme," to devote some thought to him. Durant's striking demands are also frequently mentioned in studies such as Dempf,

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{291 | 292} contribution to the nascent conciliar theory has been exhaustively interpreted.[2] On the contrary, it is probable that the systematic legal and political argument underlying his pointed demands has never been as fully understood as would have been possible or desirable.[3] But Durant's theories lie beyond the scope of this article. Instead it is addressed to the more fundamental question whether the available texts of the treatise are sound. It is somewhat surprising that this question has never been studied before, since the early modern printed editions, on which all previous work on Durant has relied, do not give the impression of being trustworthy.[4] Upon inspection of the extant manuscripts it must be concluded that the unsuspecting faith put in these editions was ill-advised, to say the least. It is the thesis of this article that every known printed edition of the *Tractatus de modo generalis concilii celebrandi* is seriously flawed, and, furthermore, that the deficiencies have prevented scholars from arriving at an adequate interpretation of the nature and the scope of Durant's plan for reform. {292 | 293}

Before the evidence is presented in detail, it will be useful to give some introductory information on the author, on his treatise, and on the sources of this study. During his lifetime, ca. 1266–1330, bishop William Durant the Younger of Mende commanded considerable respect, not only in the area under his immediate influence, i.e., the diocese of Mende and the Gévaudan, but also at

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Sacrum Imperium, 421; Carlyle, *History*, 6:24–5; Jedin, *Geschichte*, 1:5, 7, 471, 510; and Hofmann, *Repräsentation*, 253–5, 257. Finally, there are good encyclopedia articles by Mollat, "2. Durant (Guillaume)," and Naz, "Guillaume Durand."

2 For the spelling 'Durant' see Viollet, "Guillaume Durant," 2n2, but note also Heber, *Gutachten*, 65 and Andrieu, *Pontifical romain*, 3:3n1.

3 The most balanced characterization of Durant's work is given by Rivière, *Problème*, 363–9. The most detailed paraphrase of the contents is found in Viollet, "Guillaume Durant," 79–129. A stimulating interpretation can be found in Tierney, *Foundations*, 190–9. The other studies cited above make no serious attempt to proceed from paraphrases of Durant's demands to their systematic analysis. Some of the older ones, such as Heber, *Gutachten*, 73, and Haller, *Papsttum und Kirchenreform*, 65, deny the existence of any systematic coherence.

4 All the printed editions, for example, confuse the author of the treatise with his uncle; see below, pp. 156–7. There are other indications which might have prompted a careful look at the textual transmission; see below, p 175. The only scholar who seems to have used more than one manuscript of the treatise was Viollet, "Guillaume Durant," 3n4, 79n2, 82n1, 99n4, 100n2, 128n1, who knew of the manuscripts in Paris, Tours, Troyes, and Kues. E. Müller, *Vienne*, 593n28, added the Munich manuscript, and Scholz, *Publizistik*, 523 with reference to 210, the Barberini manuscript. The reliability of the printed editions will be assessed in detail below, pp. 174–81.

the courts of the king of France and of the pope.[5] There are many instances in which he is known to have acted on a high level of political responsibility: he attempted to secure peace in the war-ridden Italian possessions of the papacy as papal legate in 1305;[6] in 1307 he travelled to England in order to ascertain the facts surrounding the death of Thomas Cantilupe, bishop of Hereford;[7] between 1308 and 1311 he participated in the papal commission to investigate the Order of the Templars in France; he functioned regularly as royal counselor and became a member of the group of experts set up in 1317 to support the succession of Philip V; and it was in Cyprus, in 1330, on the return from one of his most important missions, an unfortunately little-documented embassy to Egypt, where he had been sent in the service of the king of France and the pope in order to secure favorable diplomatic conditions for the planned crusade, that he died.[8]

This was by no means an undistinguished career. But there is no doubt that the bishop is chiefly remembered for his major literary effort, the *Tractatus de modo generalis concilii celebrandi*, which was written on the occasion of the Council of Vienne (1311–12).[9] It was in this book that Durant raised an urgent call for *reformatio in capite et membris*[10] and declared that the Church of Rome "henceforth ought not to enact any general laws unless a general {293 | 294} council has been convoked, which should be summoned every ten years."[11]

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5 Unless stated otherwise, the following information on Durant's life is taken from Viollet, "Guillaume Durant."

6 In addition to Viollet, "Guillaume Durant," 64–71, see Göller, "Geschichte der italienischen Legation."

7 They were needed to permit his canonization; cf. Viollet, "Guillaume Durant," 72–5.

8 Viollet, "Guillaume Durant," 58–61.

9 His other writings are reviewed by Viollet, "Guillaume Durant," 64–79, 129–39.

10 "Videretur deliberandum si posset, per quam utile fore et necessarium quod ante omnia corrigerentur et reformarentur illa que sunt in ecclesia dei corrigenda et reformanda tam in capite quam in membris." *Tractatus maior* 1.1, fol. 4^{rb} lines 37–41. Durant has occasionally, but without proof, been credited with inventing the formula *reformatio in capite et membris*; see Lecler, *Vienne*, 40; Lecler, *Le pape ou le concile*, 49. On the notion of reform as such, see Ladner, *Idea of Reform*, esp. 298–303; Pascoe, *Jean Gerson*; and Stump, "Reform in Head and Members." {See now Stump, *Reforms*.} On reform in Roman law see Ladner, "Justinian's Theory of Law." Further references can be found in Pascoe, "Jean Gerson: 'Ecclesia Primitiva'," 379n1. {See now Frech, *Reform an Haupt und Gliedern*.}

11 "Quod [Romana ecclesia] nulla iura generalia deinceps conderet nisi vocato concilio generali quod de decennio in decennium vocaretur." *Tractatus maior* 1.96 [3.27], fol. 59ra lines 36–9. This is sufficient to call Durant a conciliar thinker in a general sense. No attempt will be made to enter into the complicated discussion concerning the meaning of the term 'conciliarism.'

No one familiar with the controversy surrounding the decrees *Haec sancta* and *Frequens*, enacted by the Council of Constance over a century later,[12] will be surprised that the contents of the *Tractatus de modo generalis concilii celebrandi* raised some hackles at Vienne, among them those of Pope Clement V and Cardinal Jacques Duèse, the future Pope John XXII.[13] After the council, a period of more than a hundred years elapsed during which nothing is known about the treatise. It would nevertheless be rash to deduce from this silence that it had been forgotten. It was going to enjoy a significant measure of popularity later on. Extant manuscripts show that, at the time of the Council of Basel at the latest, the treatise began to be copied more frequently than before, and continued to be copied until the last quarter {294 | 295} of the fifteenth century.[14] From 1531 on there is a succession of printed editions which pauses in 1584, only to end with an isolated, but by no means unimportant,

12 For the text of *Haec sancta*, see *Conciliorum oecumenicorum decreta*, 409–10. See also the recent article by Morrissey, "Decree 'Haec Sancta'." Durant's choice of a period of ten years for the general council obviously agrees with Constance's provision in the decree *Frequens*; see *Conciliorum oecumenicorum decreta*, 438–43. Aside from standard works of reference such as Jedin, ed., *Handbuch der Kirchengeschichte*, vol. 3/2, and Delaruelle, Labande, and Ourliac, *L'église au temps du Grand Schisme*, a good introduction to conciliarism may be found in Bäumer, ed., *Entwicklung des Konziliarismus*, with bibliography 393–402. Recent literature is listed in the bibliographies appended to the volumes of the *Annuarium historiae conciliorum*.

13 See for example the comments of John XXII in his letter of 10 April 1319 to Philip V: "Sed ipse [William Durant] intendens aliud forsitan quam pretendat, videlicet scisma, quod absit, inter te et Sedem istam ponere sicut et in Viennensi consilio [*sic*] inter felicis recordationis Clementem papam quintum et prelatos studiose ponere laboravit, injuste conqueritur secum agi. Vere, fili, nescimus quo ductus nisi superbie spiritu, jam plures anni sunt quod Sedi isti et ejus honori detrahere non cessavit, contra ipsam latrare non desiit, licet hec Sancta Sedes non suis sed alienis potius meritis, videlicet predecessoris sui, ipsum elevarit de pulvere et inter presules collocarit, nec adhuc, sicut fertur, cessat a talibus, sed in ipsis insistens dampnabiliter, contra stimulum calcitrare nititur ac te et alios a devotione Sedis hujusmodi deviare." John XXII, *Lettres secrètes*, 1:740–1, nr. 850. Another letter by Pope John XXII on the same subject was written on the same day and addressed to Queen Jeanne; see below, n. 76. John XXII was well acquainted with the events at Vienne. He had been one of the five members of the central commission of cardinals appointed by Clement V in order to inspect the *gravamina* submitted to the council, for which see E. Müller, *Vienne*, 117–18. There is every reason to believe that he had first-hand knowledge of Durant's treatise as a result of his participation in this commission. On the entire incident see Haller, *Papsttum und Kirchenreform*, 58–60; Viollet, "Guillaume Durant," 29–30; and E. Müller, *Vienne*, 591–5.

14 For details see above, chap. 1, and below, chap. 6.

reprint in 1671.[15] Late medieval and early modern interest in the work may also be illustrated by mentioning some of its more illustrious readers: Nicholas of Cusa (1401–64), Pierre Pithou (1539–96), and Bossuet (1627–1704).[16] Considering the forbiddingly technical form of the book, it is no exaggeration to say that it was a success.

This is the place to mention a curious confusion which served to increase the fame of the treatise while at the same time decreasing that of its author. William Durant and his uncle, William Durant the Elder, had a lot more than just their names in common.[17] Both were bishops of Mende, both were highly respected, and both were canonists of admirable skill.[18] It is small wonder that readers and copiers of the *Tractatus* soon forgot the separate identity of William Durant the Younger and counted his product among the works of his uncle.[19] The printed editions of the *Tractatus* are prefaced with a text {295 | 296} that well illustrates this state of confusion. It professes to be a *vita authoris*, but in

15 There were separate editions in Lyon, 1531, under the imprint of Jean Crespin (Joannes Crispinus), reprinted in 1534 with no changes except for a new frontispiece, and by Philippe Le Preux (Philippus Probus) in Paris, 1545, under the imprints of Galliot du Pre (Galeotus a Prato, Galeotus Pratensis) and Poncet Le Preux (Poncetus Probus). The text of Lyon, 1531, with a few minor changes and the addition of brief summaries to each chapter, was included in two large collections of jurisprudence, the *Tractatus ex variis iuris interpretibus collecti*, 2:88^{v}–117^{v}, and the *Tractatus universi iuris*, 13/1, 154–82^{v}. The edition of Paris, 1545, was reprinted in Venice, 1562, and again in Paris, 1671 (rpt. London [n.d. (1963?)]). Other editions given in various bibliographies and footnotes for which I have been unable to locate actual copies are 1561, 1572, 1617, 1635, and 1638, all assigned to Paris, or to Paris and Venice. Cf. above, pp. 147–51, and below, pp. 287–90.

16 Nicholas of Cusa owned a manuscript of the treatise, which he annotated in the margins. It is now held in Kues, St. Nikolaus Hospital, ms. 168. Pierre Pithou, too, had a copy, today in Troyes, Bibliothèque Municipale, ms. 786; cf. above, pp. 123–6, 129–32. Bossuet approvingly quoted from Durant's work. It is virtually certain, moreover, that Pierre d'Ailly, and very probable that Gerson, read it; see Viollet, "Guillaume Durant," 123–9. Louis Pinelle (ca. 1465–1516), chancellor of the University of Paris and later bishop of Meaux, owned what is now Paris, Bibliothèque Mazarine, ms. 1687. On Pinelle see Veissière, "Un précurseur de Guillaume Briçonnet," 81–2.

17 On William Durant the Elder and his works see Falletti, "Guillaume Durand," with bibliography. See also the recent article by Chevailler, "Observations sur le 'Speculum legatorum'."

18 William Durant the Elder's legal expertise is too well known to need attestation. For praise of the younger Durant's skills, and the judgment that among contemporaries he was surpassed by none except Guido de Baysio, see Tierney, *Foundations*, 191.

19 Six of the ten extant manuscripts attribute the treatise to the Speculator, i.e., the elder Durant. Only one, Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487, fol. 313, explicitly distinguishes the author from his uncle.

fact is a life of the elder Durant.[20] Only towards the end does it add a few facts and dates from the life of the younger, and that without showing any awareness of the confusion. It is the younger's misfortune that he was forgotten and that, to the present day, his work is usually catalogued among the works of his uncle. But the elder Durant was one of the greatest medieval writers of handbooks. His *Speculum iuris*, from which he gained the sobriquet 'the Speculator,' and the *Rationale divinorum officiorum*, to name but the two most important of his manuals, enjoyed a reputation far surpassing that of his nephew's book.[21] The *Tractatus* would surely have survived, but it doubtless benefited from the mistaken belief that it had issued from the Speculator's popular pen.

The sources for the findings communicated in this article consist above all of the ten medieval manuscripts of Durant's treatise, or fragments thereof, which can still be found in the libraries of Europe.[22] Only two of these are complete: they are Paris, Bibliothèque Nationale, ms. lat. 1443, fols. 1–112, henceforth cited as P; and Munich, Bayerische Staatsbibliothek, Clm 6605, fols. 2–69^{v}, henceforth cited as M.[23] Collation has fortunately shown that they are also the 'best' manuscripts {as illustrated by Figure 1 on the following page}.[24]

M, written after 1436, is the least corrupted representative of one of the two main branches into which the manuscript tradition may be divided. P, although probably older than M, is full of every conceivable kind of scribal error, but is also the sole surviving representative of the second branch of the manuscript tradition. Consequently, it sometimes yields important variants which are obviously correct, but cannot be found in any of the other manuscripts.[25] For the purposes of this study, P and M, taken together, constitute a sufficiently solid and basic text. All of the remaining eight manuscripts derive from a common ancestor, which was closely related to M. Since they are more or less fragmen-

20 See the editio princeps by Jean Crespin, Lyon, 1531, fol. 3^{r}–^{v}. The text is repeated in the other editions. The matter was finally clarified in *Gallia Christiana*, 1:94–7.

21 The catalogs of the great libraries and the bibliographies of incunabula yield ca. fifty early modern editions for the *Speculum iuris* and almost one hundred for the *Rationale*.

22 For a detailed review see above, chap. 1.

23 See above, pp. 112–23.

24 {Figure 1 is based on Table VIII in Fasolt, "William Durant the Younger's *Tractatus*," 83, which reflects the results of a partial collation of the manuscripts reported ibid., "Chapter Two: An Analysis of the Textual Tradition," 54–100.} For a thorough discussion of the idea of the 'best' manuscript see Fränkel, *Einleitung*, 123–51; cf. Boyle, "Optimist and Recensionist."

25 For an example see the variants in P cited below, n. 50.

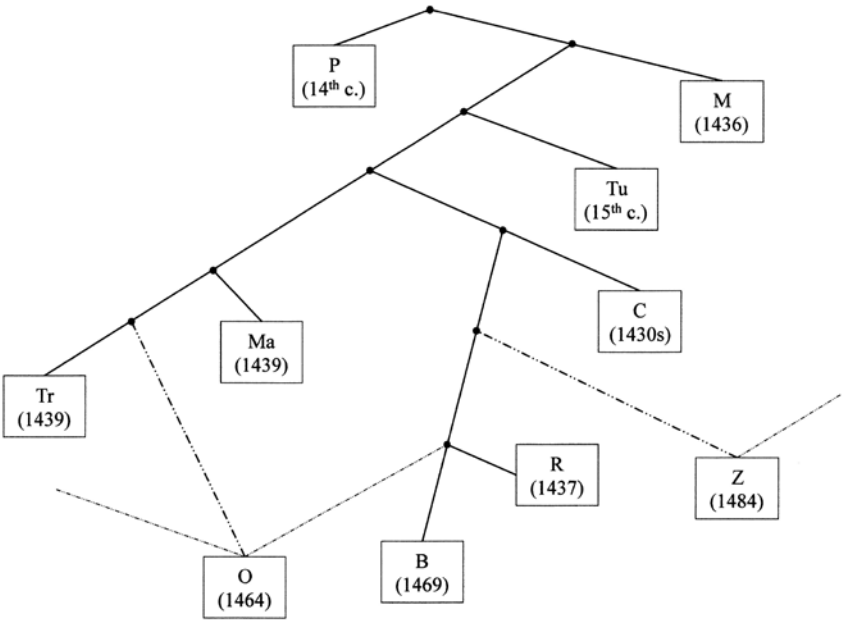

FIGURE 1 *The Manuscript Transmission of William Durant the Younger's Treatises*
P AND M CONTAIN BOTH THE *TRACTATUS MAIOR* AND *TRACTATUS MINOR*. C, MA, TR, R, AND B CONTAIN ONLY THE *TRACTATUS MAIOR*. TU, O, AND Z CONTAIN FRAGMENTS OF THE *TRACTATUS MAIOR*. UNBROKEN LINES REFLECT DEFINITE RELATIONSHIPS. DOTTED LINES REFLECT UNCERTAIN RELATIONSHIPS. YEARS INDICATE THE EARLIEST POSSIBLE DATE OF WRITING.

tary, and since they hardly ever add more than insignificant variant readings to the text of P and M, they can here be safely dispensed with.[26] {296 | 297}

1 *Tractatus maior*

Although the differences between the manuscripts and the printed editions of Durant's treatise shall be discussed in detail later on in this study, one

26 Five of these eight manuscripts contain the whole *Tractatus maior*, but omit the *Tractatus minor* entirely: Kues, ms. 168; Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487; Rome, Biblioteca Nazionale Centrale, Fondo Varia, ms. 1; Paris, Bibliothèque Mazarine, ms. 1687; and Troyes, Bibliothèque Municipale, ms. 786. For the title of the treatise see above, pp. 150–1, and below, pp. 159–60. The three remaining manuscripts are still more fragmentary: Tours, Bibliothèque Municipale, ms. 237, breaks off in the middle of *Tractatus maior* 2.71; Zurich, Zentralbibliothek, ms. S 204 0, and Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823, barely go beyond the beginning of *Tractatus maior* part 2.

difference must be mentioned now, the one without which the choice of the title *Tractatus maior* cannot be understood. The manuscripts contain two separate works,[27] of which the first and longer will be called *Tractatus maior.* The *Tractatus maior* consists of two parts of very unequal length, four chapters and one hundred chapters, respectively, and two prefaces, one introducing each part.[28] The second, shorter work, which will be called *Tractatus minor*, consists of forty chapters without any further subdivisions.[29] The printed editions present a very different aspect: they do not add to, or omit from, the text contained in the manuscripts, but they arrange it entirely differently. Instead of two separate books, there seems to be only one, which is divided into three parts. There still are the two prefaces, but part two contains only seventy-two chapters, not one hundred like the *Tractatus maior*, and part three contains sixty-three, more than the forty chapters of the *Tractatus minor.*[30] The reasons for these considerable differences will be given below,[31] but their presence raises the question whether the printed title of Durant's work is adequate.

Traditionally, the title has been *Tractatus de modo generalis concilii celebrandi.* This is slightly misleading, however, since Durant's book is by no means restricted to a discussion of councils, general or otherwise, but deals with all sorts of reform-worthy problems, ranging from the length of women's hair to the improperly exciting quality of contemporary church music.[32] In fact, the traditional title was not chosen by the author himself: it is found only in that subordinate group of eight incomplete manuscripts which was discarded {297 | 298} above. It was probably invented by a copyist with a special interest in Durant's conciliar ideas, who wrote at the height of the controversy over the powers of a general council in the early fifteenth century.[33] M inscribes the

27 This statement is justified in detail below, pp. 168–70, 174–6.

28 See below, pp. 160–1 and n. 38.

29 The meaning of these various partitions will be discussed in detail below, pp. **000–000**.

30 Careful readers may have calculated that the total number of chapters in the manuscripts is 4 + 100 + 40 = 144, whereas in the printed editions there are only 4 + 72 + 63 = 139. But no text is missing from the printed editions. In the manuscripts, the numbering of the *Tractatus minor* jumps from chapter 1 to chapter 8 so that there are actually only 34 chapters in the *Tractatus minor*; cf. below, p. 173. Thus the total of chapters in the manuscripts is 4 + 100 + 34 = 138. The printed editions only seem to contain one more chapter because they consider the last part of *Tractatus maior* 2.71 as a separate chapter, which, in their numbering, appears as *Tractatus de modo generalis concilii celebrandi* 3.2. Thus the actual total is 138 in both the manuscripts and the editions.

31 See below, pp. 174–6.

32 *Tractatus maior* 2.69, fol. 45^{vb} lines 19–31, and 2.68, fol. 45^{rb} lines 35–44.

33 The common ancestor of all eight subordinate manuscripts need not have been much older than its closest extant relative, M, written after 1436.

treatise with *Tractatus de reformacione ecclesie vniuersalis*, a title better suited to the manifold contents of the treatise than the traditional one.[34] Durant himself spoke of the *reformatio in capite et membris*[35] and of the "correction and reform of the church and the salubrious government of mankind."[36] P, however, which is our earliest manuscript, has no title at all. Since the title found in M is not confirmed by any other source, we will use the familiar and traditional *Tractatus de modo generalis concilii celebrandi* when referring to both of Durant's works, as they were printed. Individually, they will be designated by the short titles *Tractatus maior* and *Tractatus minor*.[37]

With this discussion of the title concluded, the contents of Durant's works may now be inspected. In the preface of the *Tractatus maior* the bishop informs his readers of the immediate cause for the writing of this book, namely, the convocation of the Council of Vienne by Pope Clement V. He also gives a first outline of his subject:

> Having previously carefully read those things established by the holy fathers in general or provincial councils and by others for the state of the universal church, from which we have much fallen away, I decided to write down what, in my humble opinion, ought to be treated by this council.[38]

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34 Haller, *Papsttum und Kirchenreform*, 60, probably unaware of M, already suggested replacing the traditional title with the more suitable *De reformatione ecclesiae in capite et membris*.

35 See above, n. 10.

36 "Sane videretur ad correctionem et reformationem ecclesie et ad salubre regimen humani generis posse perveniri hac brevi via." *Tractatus maior* 1.2, fol. 4^{vb} lines 8–13.

37 Since the *Tractatus minor* is not only shorter than the *Tractatus maior*, but will also be shown to have a different purpose (see below, pp. 170–2), it might seem useful to distinguish it from the *Tractatus maior* by more than just its length. But more important than the differences between the two is their substantive agreement. Since *tractatus* is found in the introduction to the *Tractatus minor* (P, fol. 91^{vb}; M, fol. 57^{rb}), it has been preserved in this study. On the title see also above, pp. 150–1.

38 "Perlectis dudum cum diligentia a sanctis patribus conciliis generalibus, provincialibus, et aliis pro statu universalis ecclesie constitutis, a quibus in pluribus est recessum, scribendum duxi ea de quibus iuxta parvitatis mee modulum agendum esse videtur in concilio memorato." *Tractatus maior*, Prologue, fol. 4^{ra} line 44–4^{rb} line 6. It is not clear in the Latin whether Durant meant 'constitutions of other councils' or 'constitutions other than conciliar' when he wrote "aliis pro statu universalis ecclesie constitutis." It is certain that he gave particular prominence to conciliar law while quoting extensively from other types of law as well; see below, pp. 163–8. On the important notion of the *status ecclesie* and its use by canonists and curialists see Hackett, "State of the Church," and Congar,

At this point, it is clear that the bishop's plan of reform rested on his study of the canon law. {298 | 299}.

His views on the necessity, the nature, and the scope of reform, including his legal and political theory, are presented in detail in part one of the *Tractatus maior.* A brief look at the chapter headings will illustrate how he dealt with the subject. Chapter one is devoted to the object of reform. It aims to show that, logically, reform must begin with the church before it can be successfully extended to the laity.[39] In chapter two, Durant establishes a fundamental principle for all attempts at reform: divine and human law, i.e., the precepts of the Bible, the canon law, and, so far as the laity was concerned, the civil law, must be rigorously enforced by ecclesiastical and secular authorities.[40] In chapter three, he goes on to argue that this is not only a legal but also a rational basis for reform.[41] He is likewise anxious to show that neither secular monarchs nor the pope are free to act against these laws, especially insofar as they are embodiments of reason.[42] Having devoted an entire rubric to the argument

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"Status Ecclesiae." It is also doubtful whether the prologue of the *Tractatus maior*, fol. 4ra line 5–4^{rb} line 6, is or is not meant to introduce the *Tractatus minor* as well. The contents of the quotation given above suggest a close relationship to the *Tractatus maior*; cf. the more explicit statement of purpose in the preface to *Tractatus maior* 2, cited below, n. 50. There is no such close correspondence to the *Tractatus minor.* That makes it more than likely that the prologue to the *Tractatus maior* has nothing to do with the *Tractatus minor.*

39 "De correctione eorum que male aguntur premittenda in Dei ecclesia a ministris ecclesiasticis in capite et in membris." *Tractatus maior* 1.1, fol. 4^{rb} lines 7–10.

40 *Tractatus maior* 1.2 is entitled: "De modo correctionis et reformationis ecclesie et christianitatis," fol. 4^{vb} lines 6–7. It continues: "Si itaque duo a quibus regitur humanum genus sicut a ministris Dei, videlicet ecclesiastica autoritas et regalis potestas, sicut Gelasius Papa scribit Anastasio Imperatori xcvi. di. duo sunt [D. 96 c. 10], vellent intendere ad dictam reformationem et salubre regimen humani generis, haberent viam amplecti predictam ut videlicet seipsos et humanum genus regerent secundum quod in lege et in evangelio et in conciliis spiritus sancti instinctu probatis, ut xvi. di. habeo [D. 16 c. 6], et in aliis humanis et comprobatis legibus et iuribus continetur." *Tractatus maior* 1.2, fol. 4^{vb} lines 32–45.

41 "Quod predictus modus correctionis et reformationis ecclesie et christianitatis sit conveniens rationi et iuri, maxime quantum ad presidentes spirituali et temporali potestati, et quod non debeant transgredi iura." *Tractatus maior* 1.3, fol. 5ra lines 16–21.

42 "Liquide constat quod [dominus papa et reges] non solum statuta in divinis legibus verum etiam a sanctis patribus in conciliis et sacris canonibus servari debent." *Tractatus maior* 1.3, fol. 5va lines 2–5. "Regenda igitur atque limitanda et restringenda est sub ratione potestas ut totum ratio regat, sicut Gregorius Mauritio Imperatori scribit xi. q. iii. illa prepositorum [C. 11 q. 3 c. 67]." *Tractatus maior* 1.3, fol. 5^{vb} lines 20–5.

that the moderns cannot equal the ancients in their obedience to the law,[43] Durant arrives at chapter four, which contains his famous conciliar remedy and is introduced as a means of "further limiting and regulating the exercise of power by the 'presidents' of the monarchy," i.e., the pope as {299 | 300} well as secular rulers.[44] The conclusion of part one consists of a short discussion of properly granted dispensations[45] and a long one intended to prove that the papal right to grant exemptions was being abused.[46]

Durant was convinced that the old order of the church had been recklessly and unjustifiably overturned by, above all, the Roman church.[47] The resulting

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43 "Rubrica de limitanda potestate superiorum. . . . Proh dolor, si premissa [i.e., the virtue and justice of the ancient Romans] servabantur in rectoribus et in administratoribus rei publice qui legis divine notitiam non habebant, nonne est inestimabile dedecus si moderni administratores rei publice, qui fide illuminati sunt et alios illuminare et corrigere debent, in se ipsis talia non observant? Verendum quippe est, si contrarium faciunt, quod et ipsi discernant et in sinu suo colligant causam suam, xvii. distinctione, §. hinc etiam [D. 17 d. p. c. 6], xxi. di. nunc autem [D. 21 c. 7]." *Tractatus maior* 1.3, fol. 7^{vb} lines 17–29 (correct: fol. 6^{vb} lines 17–29).

44 "Quarto specificatur amplius de limitando et regulando exercitio potestatis dictorum presidentium monarchie." *Tractatus maior* 1.4, fol. 7ra lines 40–3. The context shows that both the papacy and secular rulers are meant. The most explicit formulation of Durant's demand for conciliar participation in ecclesiastical legislation can be found in this chapter: "Videretur esse salubre consilium pro re publica et pro dictis administratoribus rei publice quod sic sub ratione, ut premissum est in rubricis proximis, limitaretur potestas eorundem quod absque certo consilio dominorum cardinalium dominus papa, et reges ac principes absque aliorum proborum consilio, sicut hactenus in re publica servabatur, non uterentur prerogativa huiusmodi potestatis, potissime aliquid concedendo contra concilia et contra iura approbata communiter, et quod contra dicta concilia et iura nihil possent de novo statuere vel concedere [*sic*] nisi generali concilio convocato, cum illud quod omnes tangit secundum iuris utriusque regulam ab omnibus debeat communiter approbari." *Tractatus maior* 1.4, fol. 7^{rb} lines 27–45.

45 *Tractatus maior* 1.4, *Rubrica de dispensationibus*, fols. 7^{vb} line 11–8^{rb} line 6.

46 *Tractatus maior* 1.4, *Rubrica de exemptionibus*, fols. 8^{rb} line 7–13^{rb} line 33.

47 That is the thrust of the argument made in the whole of *Tractatus maior* 1, and well expressed in the *Tractatus minor*: "Novitas nostri temporis sub inquietudine degit, quia dictum gradum et ordinem derelinquit. Secundum namque Augustinum minus ordinata inquieta sunt, ordinata vero quiescunt, et ideo, quia antiqua ordinatio de regimine mundi et ecclesie et sua unicuique iurisdictio a Romana ecclesia et presidentibus non servatur, . . . sed ad se que ad minores et medios pertinent trahere volunt, ut in eis verificetur illud: 'Cum exaltatus fuero a terra omnia traham ad meipsum [John 12:32],' mundus turbatur universalis, ecclesia leditur et gravatur, et ordo ecclesiasticus confunditur, sicut Gregorius attestatur [C. 11 q. 1 c. 39]." *Tractatus minor* 8 [3.31], fol. 62ra lines 5–21. The quotation from the Gospel of John illustrates Durant's estimate of the

turmoil threatened, in his opinion, to turn into a catastrophe in the not too distant future.[48] In order to restore and safeguard the pristine splendor of the church, its old order had to be re-established. That could be done only by actively enforcing the laws on which the old order had rested. He therefore {300 | 301} considered it his first task to recall to public awareness those ancient laws which had not been included in the standard canonical collections of the twelfth and thirteenth centuries, as well as those which had been eclipsed by recent papal administrative or legislative measures. This task is accomplished in part two of the *Tractatus maior*, which is a mine of information about the law of the church.

It is worthwhile to look in more detail at the laws which Durant collected. In the preface to part two he announces his purpose:

> Here begins part two of this treatise. It will deal in detail with the laws which were in the past established by the apostles with the inspiration of the Holy Spirit, and those which were established by the holy fathers, and by the four councils which the holy church reveres "like the four gospels, namely, the councils of Nicea, Constantinople, Ephesus, and Chalcedon," and by other councils, which were held in Greece at first and later in the different provinces of the church in the West and were of old approved by the Roman and the universal church. As these are currently nowhere observed, they are recalled to memory in this treatise and provided with a few parallels from other laws in the manner of a handbook, so that, in the words of St. Ambrose's comments on St. Luke, here quoted from Gratian's *Decretum*, "we read some lest they be neglected, others lest ignored, and

efforts to centralize the church by papal government. It contains the words spoken by Christ on his entry to Jerusalem and announcing the last judgment: "Nunc iudicium est mundi: nunc princeps huius mundi eiicietur foras. Et ego si exaltatus fuero a terra, omnia traham ad me ipsum. Hoc autem dicebat, significans qua morte esset moriturus." See John 12:31–3. Durant clearly wanted to associate his view of the future of the church with the terrors of the last judgment.

48 Whether or not the bishop's fears are a testimony to his farsightedness, they deserve to be quoted: "Nisi in hoc sacro concilio provideatur de competenti remedio in premissis, que quasi manifeste et notorie in Dei ecclesia committuntur, fides, que secundum Jacobum sine operibus mortua est [James 2:17], dicetur per fideles et infideles in prelatis et personis ecclesiasticis . . . periisse. . . . Et elapso et transacto presenti sacro concilio, in omni statu reformatione carente, nisi reformatio debita facta fuerit <incomparabiliter> [P] peiora prioribus subsequentur, et omnia imputabuntur domino nostro summo pontifici, eiusque venerabili collegio, et huic sacro concilio, qui possunt et debent corrigere supradicta et obviare eisdem." *Tractatus minor* 9 [3.32], fols. 62va line 40–62^{vb} line 16.

> others, not in order to keep them, but to reject them."[49] If some of the specified laws are found to be useful and advantageous to the universal church, the council [of Vienne] should deliberate whether they ought to be maintained or revoked as a whole, or merely altered or re-interpreted, provided that is considered expedient.[50] {301 | 302}

Thus the preface informs the reader that part two was meant to be a collection, not just of any old laws, but of forgotten or neglected conciliar laws.[51] It indicates that these ancient conciliar laws will be presented in more or less the historical, or chronological, order in which they were issued. Other types

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49 Viollet, "Guillaume Durant," 86 and n. 2, charges Durant with tampering with the text of St. Ambrose. But Durant quoted it in the form in which he found it in canon law, and there the only basis for Viollet's claim seems to be the reading *ne negligantur*, which Durant used instead of Friedberg's *ne legantur*. But *ne legantur* is an obvious haplography for *ne negligantur*, and the latter not only makes more sense in the context of D. 37 c. 9, but is also suggested by the variants in Friedberg's apparatus and was, indeed, the version retained by the *Editio Romana* of the *Corpus iuris canonici*, because the medieval glosses relied on it; cf. *Decretum Gratiani emendatum*, D. 37 c. 9.

50 "Incipit secunda pars istius tractatus, in qua in speciali agitur de his que ab <antiquo fuerunt spiritus sancti instinctu> [P] ab apostolis constituta, et a sanctis patribus, et a quatuor conciliis, scilicet Niceno, Constantinopolitano, Ephesino, et Calcedonensi, que sicut sancti evangelii quatuor libros sancta ecclesia veneratur, xv. dist. sicut [D. 15 c. 2], et <xvi.> [P] dist. c. ii., iii., et iv., et sequentibus [D. 16 cc. 2–6], et ab aliis conciliis in Grecia primo et postmodum in occidentali ecclesia in diversis provinciis celebratis et a Romana et universali ecclesia ab antiquo approbatis, que <presentialiter> [P] usquequaque non servantur, quorum in presenti tractatu cum paucis concordantiis aliorum iurium sub <breviloqui> [P] memoria agitur ad hunc finem ut legamus aliqua ne negligantur, alia ne ignorentur, et alia, non ut teneantur, sed ut repudientur, sicut ait beatus Ambrosius super Lucam et in decretis, xxxvii. dist. legimus [D. 37 c. 9]. Si aliqua in dicta specificatione casuum reperiantur utilia et universali ecclesie proficua, quod sacri provisione concilii super eorum observantia vel revocatione aut <immutatione> [P] vel declaratione deliberatio si visum fuerit expediens, habeatur." *Tractatus maior* 2, *Prefatio*, fol. 13^{rb} line 35–13va line 19. It is not quite clear in the Latin to which grammatical subject the phrase *et a Romana et universali ecclesia ab antiquo approbatis* belongs. The translation assumes that it belongs only to *aliis conciliis in Grecia primo et postmodum in occidentali ecclesia . . . celebratis*, because that is grammatically most sound and because these were the councils whose authentication by Rome needed to be stressed. If one compares the text of this preface with the prologue of the entire *Tractatus maior* (see above, n. 38), it becomes clear that the latter is a brief, but precise, description of the purpose of *Tractatus maior* 2.

51 In Durant's view, the "laws established by the apostles," i.e., the collection otherwise known as the *Canones apostolorum*, and the "laws established by the holy fathers" were the earliest conciliar decrees of the church. Note the parallel above, n. 38.

of law will indeed be quoted, but only in order to establish "parallels . . . in the manner of a handbook." That part two does precisely what the preface promises seems never to have been noticed, or at least not taken very seriously,[52] probably because almost all the texts gathered in part two belong to the subordinate category of "a few parallels from other laws." In fact, the promised collection of conciliar law consists of no more, but also no less, than the very first canon cited in each of the chapters of part two.[53] Some chapters are rather long, so it is very easy to lose sight of the existence of this special collection, on which Durant's call for reform rested. By listing the canons quoted first in each of the hundred chapters of part two, it can, however, easily be shown that they indeed form a collection of conciliar law. Such a list, slightly modified to provide a systematic table of contents for the whole *Tractatus maior*, is given in table 1.[54]

This table requires comment. First, it shows which source Durant relied on above all others. Since he proves to be acquainted with a number of canons not included in Gratian's *Decretum* or the *Liber extra*, and to know the chronological order of the ancient councils, it is clear that he used one of the old, chronological collections of canon law. His prime source was, in fact, the Pseudo-Isidorian collection.[55] It has been noted by others that Pseudo-Isidore

52 Viollet, "Guillaume Durant," 85–6, believed it merely probable that Durant arranged his material in the order of the chronological canonical collections. How little weight he attributed to this observation, however, is illustrated by his failure to recognize the contents of *Tractatus maior* 2.1 as excerpts from the *Canones apostolorum*; see Viollet, "Guillaume Durant," 87.

53 Only *Tractatus maior* 2.1 consists in its entirety of conciliar canons, i.e., excerpts from the *Canones apostolorum.* The twenty-six canons there quoted are nrs. 7, 10–16, 20, 25–6, 28, 30–5, 38–44, 48.

54 See below, pp. 184–7. Beginning with *Tractatus maior* 2.84, the subject of the chapters, and not the first canon cited, is tabulated. The reason for this is discussed below, pp. **000–000**. The numbering of canons is taken from Hinschius, ed., *Decretales Pseudo-Isidorianae*.

55 The bishop of Mende was most interested in conciliar law, and for this reason he rarely used Pseudo-Isidore's famous forged papal decretals, although he mentions them in *Tractatus maior* 2.34, fol. 30va line 4–30^{vb} line 14. He also quoted extensively from such typical Pseudo-Isidorian texts as the *Ordo de celebrando concilio*, Hinschius, *ed., Decretales Pseudo-Isidorianae*, 22–4, and the *De primitiva ecclesia et sinodo Nicena*, ibid., 247–9; it is therefore certain that he used Pseudo-Isidore. It might be thought that he also used the *Collectio Hispana.* But since there seems to be not a single one among his more than two thousand quotations from canon law which cannot be traced to either Pseudo-Isidore or the *Corpus iuris canonici*, that is very unlikely. It should finally be noted that the order in which Pseudo-Isidore presents the councils is not strictly chronological. To call it chronological or historical conveniently distinguishes it from the systematic and

was {302 | 303} among the sources from which Durant quoted.[56] The fact that his longest direct quotations come from there might have been taken as an indication that it meant more to him than other sources.[57] It now appears that it provided the backbone for the organization of the entire treatise. This provides evidence of a resurgence of interest in the older collections of canon law which echoes the turn to ancient sources so fundamental for the Gregorian reform-movement of the eleventh century.[58] The renewed study of Pseudo-Isidore may also have opened one of the paths by which the concept of the *ecclesia primitiva* came to play its prominent role in late medieval thought.[59]

Secondly, it must be noted that at a few points on the list the Pseudo-Isidorian order of councils is not observed, namely in *Tractatus maior* 2.52–4, 2.70–2, and 2.84–100. There are good reasons for these divergences from the basic order. *Tractatus maior* 2.70–2, for example, forms a coherent whole, devoted to the extent to which secular power could, or could not, be employed in matters of interest to the church. Thus these three chapters really provide an uninterrupted chain of laws appended to canon eleven from the first council of Toledo, with which chapter seventy begins. It ends with a reference to Giles of Rome's *De ecclesiastica potestate*.[60] It is only in chapter seventy-three that the survey of neglected conciliar law continues with the twenty-first canon of the same first council of Toledo. {303 | 304} The case of *Tractatus maior* 2.52–4 is similar: canon three of the Council of Vaison is not found between the canons of the councils of Orange and of Agde, where the Council of Vaison

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non-chronological collections of classical canon law which make up the *Corpus iuris canonici*. On Pseudo-Isidore see Fuhrmann, *Einfluss und Verbreitung*, with abundant bibliography in 1:xv–li.

56 E.g., Viollet, "Guillaume Durant," 89.

57 In addition to the texts mentioned in n. 55, see *Tractatus maior* 2.70–1.

58 It may be a general characteristic of institutional crises that they foster an interest in old legislation. It is therefore worthwhile pointing out that the Gregorians' interest in the old law ministered to a rise in the power of the papacy, whereas Durant was concerned with limiting it. On these perspectives see Olsen, "Idea of the *Ecclesia Primitiva*."

59 In *Tractatus maior* 2.2–8, Durant quoted extensively from the section in Pseudo-Isidore entitled *De primitiva ecclesia et sinodo Nicena*; see above, n. 55. On the concept of the *ecclesia primitiva* see Olsen, "Idea of the *Ecclesia Primitiva*," Pascoe, "Jean Gerson: 'Ecclesia Primitiva'," and Ditsche, "Die Ecclesia primitiva."

60 Posch, "Reformvorschläge," 289–90, and E. Müller, *Vienne*, 596n40, believed this referred to Giles's earlier work, *De regimine principum*. But in *Tractatus maior* 2.95 [3.26] Durant states explicitly that he is referring to the same book as in *Tractatus maior* 2.72 [3.3]. Since *Tractatus maior* 2.95 is entitled "De potestate ecclesiastica super temporales dominos et dominia temporalia," it is quite certain that Durant had Giles's *De ecclesiastica potestate* in mind.

belongs chronologically according to Pseudo-Isidore, and where its canon four is indeed dealt with, but instead among the canons of the Council of Agde. It thus joins canon thirty-eight of Agde, dealt with in *Tractatus maior* 2.52–3, so as to form a coherent section on unauthorized traveling by monks and clerics.

There remain the seventeen chapters at the end of part two. Only some of these begin with conciliar canons, and there is no discernible chronological order. Examination of the subjects there covered will suggest why this may be so: they largely consist of contemporary problems. There were no mendicants when Pseudo-Isidore compiled his collection in the ninth century, and consequently Durant could not take any canons from there to apply to them. *Tractatus maior* 2.84–95 [3.15–26] may therefore be called a supplement to the chronological section of the second part of the treatise, a supplement devoted especially to contemporary problems.[61]

Tractatus maior 2.96–100 [3.27–30, 2.71, 2.100], the concluding chapters of the treatise, constitute the most significant deviation from the order of Pseudo-Isidore's collection. They deal in turn with the reform of the Church of Rome, of the prelates, of the secular clergy, of the religious, and of the laity. This appears to be a brief recapitulation of the entire reform program, but one abandoning the historical structure of part two in favor of a systematic arrangement according to the hierarchical order in which contemporary society appeared to be arrayed to a cleric such as the bishop of Mende. In fact, the five concluding chapters provide a summary of the *Tractatus maior* where any reader of the treatise could quickly check to see if the author had dealt with a specific question. They contain the same proposals for reform previously given in parts one and two, but without many of the details and without the supporting system of references to canon law so copiously supplied in the preceding chapters. A reader of this summary did not, however, have to be satisfied with Durant's ideas in their naked form and forgo the legal expertise on which they were founded. At the end of each of the five concluding chapters appears a list of cross references to the preceding sections.[62] They are tabulated in table 2, which shows that every chapter of the treatise is mentioned at least once in the summary, and often more than once.[63] *Tractatus maior* 2.96–100 thus furnishes

61 Since ancient laws failed to cover all the topics Durant wanted to include, such a supplement could not be avoided. This does not mean that it excluded all ancient legislation, but that its tenor became decidedly contemporary.

62 These lists are mentioned by Viollet, "Guillaume Durant," 100, 109–10.

63 The sole exception is *Tractatus maior* 2.72 [3.3], the first reference to Giles of Rome's *De ecclesiastica potestate*; see table 2 below, p. 188.

the reader with not only a summary of Durant's ideas, but also an index of the entire book. {304 | 305}

There are two reasons why this is important. First, it proves that the book was meant to give its information in as readily accessible a form as possible. It could thus serve as a handbook and did not have to be read in its entirety to be useful, a feature which may have greatly improved chances for spreading the ideas contained in the *Tractatus*. Secondly, the very fact that Durant composed an index proves that he was well aware of the difficulties which the chronological arrangement of *Tractatus maior* 2.1–84 raised for a reader seeking specific information. Since he realized this, he must have had a better reason for preserving the original historical order than the mere convenience of not having to reshuffle notes taken from an outdated canonical collection. This reason, it may be suggested, was to stress that a whole body of law, namely ancient conciliar law, had fallen into disuse. The greater the contrast drawn between the old and the new, or papal, law, the more convincing Durant's case for restricting papal legislative freedom.

To conclude, the *Tractatus maior* was a handbook of canon law, composed to persuade the Council of Vienne of the soundness of Durant's views concerning the reform of the church. It was designed to inform both the thorough and the casual user about laws which applied to a large variety of questions of reform, and to remind them particularly of forgotten conciliar law. It was introduced with a theoretical section aiming to prove that these laws had lost none of their power to bind even the papacy. By its very structure it supported the argument that the need for reform arose from a deep-rooted contradiction between the sovereignty of the pope and the true *ordo ecclesiasticus* laid down in the ancient laws. It thus provided support for Durant's contention that the uninhibited exercise of papal legislative power was the true source of the church's troubles.

2 Tractatus minor

The *Tractatus minor* differs from the *Tractatus maior* both in structure and in tone.[64] In its first three chapters, Durant once again expounded what he considered to be the legal principles of reform. This part of the *Tractatus minor* is closely related to the first part of the *Tractatus maior*,[65] although the sharp

64 See table 3 below, pp. 189–90.

65 Compare, e.g., *Tractatus minor* 1 [3.30], fols. 61^{rb} line 12–61va line 23, with *Tractatus maior* 1.1, fols. 4^{rb} line 17–4^{vb} line 5, or *Tractatus minor* 8 [3.31], fol. 61^{vb} lines 9–39, with *Tractatus*

edge of Durant's attacks has been somewhat blunted. Instead of singling out the papacy as the main target {305 | 306} of his criticism, Durant now emphatically included all the prelates of the church in his charges.[66] Here one can also find the passages which are most frequently cited to prove that Durant, after all, recognized papal primacy.[67] The three introductory chapters are followed by a survey of contemporary 'abuses' in *Tractatus minor* 10–16 [3.33–39]. The remainder, *Tractatus minor* 17–40 [3.40–63], is concerned with remedies for these abuses. They are arranged in three large groups: clerical education in *Tractatus minor* 17–22 [3.40–5], pastoral care in *Tractatus minor* 23–6 [3.46–9], and matters pertaining to the divine office and other clerical functions in *Tractatus minor* 27–40 [3.50–63]. The chronological arrangement of the *Tractatus maior* has been rejected in favor of a topical one, but the substance of Durant's reform proposals is unchanged.[68] The *Tractatus minor* may then be roughly characterized as a condensed and recast version of the *Tractatus maior*.

The manuscripts leave no doubt that the forty chapters following the index to the *Tractatus maior* present a self-contained and independent treatment of the same questions to which the *Tractatus maior* was addressed. Were it not for the fact that the printed editions treat the *Tractatus minor* as part of another, larger book, there would be no need to discuss the question of the *Tractatus minor's* independence. But since this is not the case, it may be

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maior 1.2, fols. 4^{vb} line 8–5^{ra} line 15. On the omission of chapters 2–7 in the *Tractatus minor* see below, p. 173. The very beginning of *Tractatus minor* 1 [3.1] seems to have been modeled on the summary in *Tractatus maior* 2.96; compare *Tractatus minor* 1 [3.1], fol. 52^{ra} lines 8–25, with *Tractatus maior* 2.96 [3.27], fol. 58^{va} lines 9–19.

66 See *Tractatus minor* 1 [3.1], fol. 52^{ra} line 25–52^{rb} line 8.

67 "Sacrosancta Romana ecclesia . . . caput est omnium aliarum, ad quam tamquam ad caput ecclesiarum omnis sancte religionis relatio est secundum Gregorium referenda [D. 12 c. 2], et quam tamquam caput et matrem omnium ecclesiarum secundum Calixtum membra omnia sequi debent [D. 12 c. 1], <nec aliunde sicut Innocentius Papa scribit auctoritatem debent accipere vel exemplum [D. 11 c. 11]. Ipsa namque sicut Stephanus> [P] Papa scribit est omnibus posita in speculum et exemplum [D. 19 c. 4]." *Tractatus minor* 1 [3.1], fol. 52^{ra} lines 13–20. Note the use of these words made by Scholz, *Publizistik*, 215; Viollet, "Guillaume Durant," 118; Posch, "Reformvorschläge," 290; E. Müller, *Vienne*, 593n27; and Torquebiau, "Gallicanisme," 286–7. In context, however, they serve above all to heighten the contrast between Rome's duties and its actual shortcomings as conceived by Durant. Cf. also *Tractatus minor* 1 [3.1], fol. 52^{ra} line 20–52^{rb} line 25, and *Tractatus minor* 9–16 [3.32–9].

68 That is not to deny that substantive differences exist. Certain proposals were omitted and some others were added; see below, p. 173. On the whole, however, the *Tractatus minor* repeats demands that were also made in the *Tractatus maior*.

useful to review the single piece of manuscript evidence which supports the inclusion of the *Tractatus minor* in the *Tractatus maior*.[69] The beginning of the *Tractatus minor* reads as follows in M (fol. 57^{rb}): "Incipit tercia pars Tractatus Reuerendi In Christo patris domini G. dei gratia episcopi Mimatensis." That this text must not be taken at face value, however, is shown by the different version in P (fol. 91^{vb}): "Explicit secunda pars. Tractatus Reuerendi in Christo patris domini G. dei gratia Mimatensis episcopi. Rubrica prima. De reformation vniuersalis ecclesie." This is not unambiguous, but the full mention of Durant's title suggests that more is at stake than merely a transition from one part to another within the same book. The period after {306 | 307} "explicit secunda pars" in P, in other words, must be understood as an emphatic one, and "Tractatus . . . Mimatensis episcopi" as the title with which a new book is introduced. If seen in conjunction with the evidence given above, this leaves little doubt that M's reading, "Incipit tercia pars Tractatus," must be attributed to a well-intentioned but mistaken copyist.

The reason why the *Tractatus maior* was rewritten and shortened in the *Tractatus minor* remains to be considered. A striking difference of style between the two works is immediately apparent. The *Tractatus minor* contains fewer citations from canon law than does the *Tractatus maior*, and those which remain are regularly given in a simpler and less precise manner. Instead of puzzling readers unfamiliar with canon law with references such as to "twelfth distinction, precepts," as Durant was wont to do in the *Tractatus maior*, in the *Tractatus minor* he refers to the same text without technical references and simply says: "According to Pope Gregory 'holy religion in its entirety must be related to the Roman church as to the head of all churches'."[70] This method of citation makes it harder to verify the source, but it also makes the author's point immediately understandable. While it might be unnecessary to give many such direct quotations in a work like the *Tractatus maior*, which was meant for people with the time and the tools to look up a brief reference, it would be very necessary to do so in a text meant to be immediately understood by an audience unable to do much research. This marked concern for the needs of an audience is also manifest in the *Tractatus minor*'s use of oratory. The *Tractatus maior* is as dry and technical as any handbook of canon law could be expected to be, whereas the text of the *Tractatus minor* is much more vivid and shows some attention to rhetorical effect. The survey of con-

69 For a discussion of the reasons why the printed editions treat Durant's works as a single book and a refutation of their testimony see below, p. 174–9.

70 Cf. *Tractatus maior* 2.27, fol. 27^{vb} line 4, with *Tractatus minor* 1 [3.1], fol. 52ra lines 14–16.

temporary immorality in chapters 10–16 is woven around a properly gloomy allegory about the ruin of the proud Babylon, taken from Isaiah 34:13–15 and applied to the contemporary church.[71] The *Tractatus minor*, in other words, presupposes an audience unable to devote much time and effort to a thorough understanding of purely technical matters. If the relative moderation of the *Tractatus minor* is also taken into consideration, the possibility emerges that the *Tractatus minor* is the text of a sermon delivered by the bishop of Mende at the Council of Vienne. {307 | 308}

Two revealing pieces of evidence support this view. At the end of the *Tractatus minor* appears the following: "These words were spoken by the reverend father, Lord William, by God's grace bishop of Mende, in the council that was held at Vienne."[72] The simplest explanation for this colophon is provided by our hypothesis. But unfortunately *dictare* can mean not only 'to orate,' but also 'to write,' or 'to compose.'[73] The statement can therefore be taken to prove neither that the *Tractatus minor* was given as a sermon at Vienne, nor even that it was a sermon. Moreover, the phrase 'these words,' *ista* in the Latin, is ambiguous. It may refer not only to the *Tractatus minor*, but also to the *Tractatus maior*, and in this case there could of course be no question of a sermon.

In light of these difficulties the second piece of evidence gains in importance. It consists of a marked difference in the way in which Durant refers to the Council of Vienne in the two treatises. In the *Tractatus maior* he always

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71 "Prohdolor quia videtur in ipsa ecclesia verificari dictum Esaie c. 34[:13–15] in figuram Babylonice civitatis gloriose in regnis et inclite in superbia Caldeorum, de qua dicitur: erit cubile draconum et pascua struthionum. . . . Onocentaurus et pilosus clamabit alter ad alterum. Ibi <cubabit> [P] lamia et <inveniet> [P] sibi requiem. Ibi <habebit> [P] foveam ericius, et <enutriet> [P] catulos. Illic <congregabuntur> [P] milvi alter ad alterum." *Tractatus minor* 9 [3.32], fol. 62va lines 16–26. The various figures in this description are compared to the mortal sins in *Tractatus minor* 10–16 [3.33–9], where they are surveyed in detail. For examples of stylistic differences between the *Tractatus maior* and the *Tractatus minor* compare the texts in notes 40–4, 47–8, and 50. The full extent of these differences can be appreciated only in a consecutive reading of the *Tractatus maior* and the *Tractatus minor*.

72 "Ista dictata fuerunt in concilio generali Vienne celebrato per reverendum patrem dominum Guillelmum Dei gratia episcopum Mimatensem." *Tractatus minor* colophon, fol. 74^{vb} lines 13–16. This text has been noticed before; see E. Müller, *Vienne*, 593n28 with reference to M, and Göller, "Geschichte der italienischen Legation," 16n2. As long as the *Tractatus minor* and the *Tractatus maior* were believed to be one work, however, its actual significance could not be perceived.

73 See, e.g., Forcellini, *Totius latinitatis lexicon*, or Du Cange, *Glossarium*, s.v. 'dictare.'

says 'the council,' or 'the holy council,' and the context invariably shows that the council had not yet met.[74] In the *Tractatus minor*, however, he consistently speaks of 'this council,' or even 'the present holy council.'[75] This again does not prove that the *Tractatus minor* was actually a sermon, but at least it certifies that the *Tractatus minor* presupposed the actual session of the council. The main distinction between the *Tractatus maior* and the *Tractatus minor* must, then, be sought in their differing purposes. Both, it is true, were written on the occasion of the Council of Vienne, but whereas one was a handbook destined to be used long after the council had finished its work, the other, the *Tractatus minor*, was a brief text immediately directed at the fathers assembled at Vienne.

It is unfortunate that more precise information is lacking; any hint of what the fate of the two books at the council was would be welcome. The letters of Pope John XXII of 10 April 1319, which have been mentioned above, show that Durant had, as the pope describes it, attempted to create a schism at the Council of Vienne by venturing (*temptare*) a book against Pope Clement V.[76] Having been detected, Durant, so the pope continues, dedicated {308 | 309} the book to Clement V. John XXII expresses himself in tantalizingly ambiguous language. Does *temptare librum* imply that Durant did not complete his attempt? Was the *liber* the *Tractatus maior*, or the *Tractatus minor*, or both? Was Durant denounced for what he said in the *Tractatus maior* and did he deceive the pope by showing him only the *Tractatus minor*? Or did the *Tractatus maior* perhaps not circulate at Vienne? Did a copy of the *Tractatus minor* circulate before Durant had publicly spoken about his ideas? Was the copy which he dedicated

74 See *Tractatus maior* 2, *Prefatio*, fol. 13va line 15, which is cited above, pp. 163–4 and n. 50; *Tractatus maior* 2.15, fol. 22^{rb} lines 10–11; 2.18, fol. 23^{rb} lines 40–1; 2.21, fol. 25va lines 33–4; and 2.23, fol. 26^{vb} lines 43–4.

75 See *Tractatus minor* 9 [3.32], fols. 62va line 40, 62^{vb} line 14, and esp. 62^{vb} lines 8–9: *presenti sacro concilio*, quoted in context above, n. 48.

76 See above, p. 155 and n. 13. In his letter of 10 April 1319 to Queen Jeanne, John XXII gave some additional information: "In consilio [*sic*] siquidem Viennensi, contra felicis recordationis Clementem papam quintum, predecessorem nostrum, cui ipsum fidelitatis vinculum astringebat, scisma suscitare voluit et temptavit librum contra ipsum et Sedem hujusmodi, sicut notum est fratribus nostris qui tunc aderant et multis aliis, fabricando, et demum cum hec ad prefati predecessoris nostri notitiam pervenissent, librum ipsum cum humilitate apparenti maxima, eidem predecessori nostro, petita venia, assignavit sicut sciunt qui reconciliationem hujusmodi procurarunt." John XXII, *Lettres secrètes*, 1:739, nr. 849.

to the pope revised? Many more possibilities could be imagined, but the lack of evidence makes such speculation idle.[77]

Yet, one point deserves further attention. The *Tractatus minor* shows evidence of tampering with the text which may well be connected with the incident reported by John XXII.[78] Chapters 2–7 appear to be missing. This may simply result from a mistaken numbering of chapters,[79] but it does not seem likely, because of one glaring difference between the *Tractatus maior* and the *Tractatus minor*: the latter does not contain a single allusion to the fact that, in the *Tractatus maior*, Durant wanted to institutionalize legislative controls with the help of decennial general councils. He is hardly likely to have changed his mind in the time between finishing the *Tractatus maior* and writing the *Tractatus minor*.[80] The statements of theoretical importance which Durant does make in the *Tractatus minor* correspond precisely to those of the *Tractatus maior*. The question is thus not whether ideas were transformed, but why they are absent. Was the conciliar solution contained {309 | 310} in the missing chapters 2–7? Was it excised in order to appease the wrath of Pope Clement V? This is an attractive explanation of the evidence, but there are too many imponderables to elevate it from the status of possibility to that of probability.[81]

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77 The most probable interpretation is perhaps that the offensive book was indeed the *Tractatus minor*, that Durant circulated it among the fathers at Vienne, was taken to task by Pope Clement V, and removed the most inflammatory passages before surrendering the text to the pope. See just below. But see also n. 81.

78 Revisions of the text were suspected by Haller, *Papsttum und Kirchenreform*, 59–60. E. Müller, *Vienne*, 595, rejected Haller's notion for lack of evidence.

79 The way in which P introduces chapters 8 and 9 makes this unlikely: *porro* and *tertio*, i.e., 'second' and 'third.' A 'first' is missing and might have been found somewhere in chapters 2–7. M, followed by the printed editions, begins chapter 8 *porro* and chapter 9 *secundo*, not *tertio*. But that is clearly a mistaken 'emendation' by the scribe of M or one of its ancestors, because in *Tractatus minor* 26 [3.49], fol. 70^{rb} lines 2–4, Durant refers back to *Tractatus minor* 9, and at that point both P and M agree on calling *Tractatus minor* 9 'the third method of reform' (*de tertio modo reformationis ecclesie*). At that point the scribe of M had already forgotten that he had decided to call the subject of *Tractatus minor* 9 the 'second method of reform.'

80 Both works must have been written after the bull of convocation for Vienne was issued on 12 August 1308. Whereas the *Tractatus maior* was probably completed before the council met in the fall of 1311, the *Tractatus minor* may well have been composed while the council was in session. See the colophon above, n. 72.

81 {In fact, there is a good reason to believe that there is nothing missing between chapters one and eight, namely, that *Tractatus minor* 1–8 is a composite of quotations taken

Returning from this hypothetical excursus, one thing may be taken as certain: the *Tractatus minor* is a separate work. Except for the central conciliar proposals, perhaps lacking because of some external cause, the *Tractatus minor* repeats the demands which were made in the *Tractatus maior*. The form in which this program of reform is presented, however, suggests that the *Tractatus minor* was intended to be read by the prelates assembled in Vienne. Whatever its actual function may have been, whether a sermon or a pamphlet, and whatever its role in the collision with Clement V, when Vienne was past it had served its purpose.[82]

3 The Printed Editions

The foregoing pages describe the work as it appeared to medieval readers. The printed editions, however, on which most modern readers, and all recent scholarship, rely, provide a very different picture.[83] The last step in this study must, therefore, be an examination of the printed editions and an explanation of the differences between them and the manuscripts. At first sight these differences seem great. In the printed editions the two treatises are presented as one book consisting of three parts of four, seventy-two, and sixty-three chapters respectively. That the *Tractatus minor* should be treated as part three of a larger book would in itself be as insignificant as the same error committed by M,[84] but that the hundred chapters of the original part two of the *Tractatus maior* should have been reduced to a mere seventy-two, and the forty chapters of the *Tractatus minor*—actually only thirty-four, since chapters 2–7 are missing—enlarged to sixty-three, would be a remarkable transformation. In reality the change is not so great, because the actual texts of the *Tractatus maior* and the *Tractatus minor* are almost completely unchanged. What has changed is the numbering of the chapters. Thus, *Tractatus maior* 2.72–98 corresponds precisely to chapters 3.3–29 of the printed editions, and *Tractatus minor* 8–40 to chapters 3.31–63.

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almost verbatim, and without significant omissions, from *Tractatus maior*, 1.1–3, and the summary in 2.96; see Fasolt, *Council and Hierarchy*, 295n20.}

82 Most of the manuscripts do not contain the *Tractatus minor*; see above, n. 26.

83 Some manuscripts continued to be read in the early modern period. A reader of P with a hand of the late sixteenth or early seventeenth century noted in the margins of P, fols. 77, 81, that it differed from the printed editions.

84 See above, p. 173.

What was the reason for this renumbering? Further examination reveals that two relatively short pieces of text have changed places. To avoid repetition, these two pieces will be referred to as A and B. In the original form of the {310 | 311} work, the first of these, A, contained the middle of *Tractatus maior* 2.71, whereas the second, B, contained the end of *Tractatus maior* 2.99, the whole of the brief *Tractatus maior* 2.100, and the beginning of *Tractatus minor* 1. The dividing line between the *Tractatus minor* and the *Tractatus maior* was thus found in B, and when, for reasons to be given shortly, A and B changed places, the dividing line moved together with B to the place A had formerly occupied, i.e., to the middle of *Tractatus maior* 2.71. At some later stage a copyist must have been dissatisfied with the fact that the chapters following chapter one of the *Tractatus minor* in its new location were numbered 72, 73, 74, and so on. Failing to recognize that they were in the correct order, and the beginning of the *Tractatus minor* in the wrong place, he renumbered every chapter following chapter one of the *Tractatus minor.* The version of this hypothetical scribe is the one reproduced in the printed editions.[85]

Quite apart from the fact that the text of the manuscripts makes sense whereas that of the printed editions does not, there is additional and equally conclusive evidence to show that the printed editions present an arrangement which cannot be the original one. The last chapter of part two of the *Tractatus maior* is still numbered 2.100 in the editio princeps (Lyon, 1531), although it immediately follows chapter 2.71.[86] There is no way to explain this except as has been described here. This is also true of the cross references in the summary of the *Tractatus maior.* In the printed editions the five concluding chapters, formerly *Tractatus maior* 2.96–100, have now become chapters 3.27–30, 2.71, and 2.100. But they still refer the reader to chapters 2.73–99, although no such chapters exist in the printed editions.[87] Obviously the manuscripts contain the original and proper arrangement.

There is a simple explanation for the confusion that was introduced when the two portions of text were inverted. A and B are of approximately the same length, covering a little less than 2.5 columns in the editio princeps; thus each of them may well have accounted for a folio of the manuscript in which the confusion first occurred. Imagine that the two folios composed of A and B were the first and the last folios of a gathering of perhaps sixteen folios, or,

85 Further changes in editions other than the editio princeps are discussed below, pp. 180–1.

86 The edition of Paris, 1545, and its descendants Venice, 1562, and Paris, 1671, took the logical step of renumbering this chapter 2.72.

87 Such incongruities might have made the printed editions suspect.

alternatively, that the two halves of the outermost sheet in a gathering of eight sheets were folded so as to produce sixteen folios.[88] Imagine, further, that this gathering fell {311 | 312} out of a loosely bound manuscript, and that the outermost sheet separated from the bundle, or perhaps did not. In any case, when the gathering was reinserted into the manuscript, the sheet made up of folios A and B may have been folded backward. As a result, B, the last folio of the gathering, would have exchanged places with the first, A. Such was probably the origin of the confusion now found in the printed editions. Probably, not just possibly, for a small point adds still more credibility to this account. In the printed editions, the same two sentences appear twice, although separated by some eighteen pages.[89] If our hypothesis is correct, these two sentences would, in the manuscript, have been found at the end of folio A and at the top of the folio immediately following it. Mistaken duplication of whole sentences is perhaps nowhere likelier than at the point where one folio ends and the next begins, and this is precisely the condition which is here postulated.

Figures 2 and 3 are designed to show what seems to have occurred. The left half of Figure 2 represents the state of the text in the manuscript version. The first and second column indicate the division of the text into parts and chapters in the manuscripts. The third column shows the original position of the two folios, A and B, relative to the parts and chapters. The borderlines separating the two folios from the unchanged portions of the text are identified by the words straddling them. It will be noted that the last two sentences on folio A are repeated immediately afterward. This is a characteristic which can hardly have existed in any manuscript other than the one in which the transposition occurred. The right half of Figure 2 represents the state of the text in the printed editions. The first and second column again indicates the division

88 If ca. 2.5 columns in the editio princeps correspond to about one whole folio in the hypothetical manuscript, then the 32.5 columns in the editio princeps between A and B, fols. 52^{rb} line 25–60^{rb} line 46, would correspond to ca. 13 folios in the manuscript. Allowing for imponderables, the fact that A and B are rather less than 2.5 columns, and the likelihood that a gathering would consist of an even number of folios, 14 would appear to be the likelier number. By adding these to the two folios A and B one would obtain 16 folios in a gathering of 8 sheets—but obviously this is no more than a possibility, mentioned only in order to explain the choice of figures in the text.

89 The duplicated passage reads as follows: "Regem enim eterna iura faciunt, non persona, quia non constat sui mediocritate, sed sublimitatis honore. Que ergo honori debeant, honori deserviant, et que reges accumulant regno relinquant ut, quia eos regni gloria decorat, ipsi quoque regni gloriam non extenuent sed exornent." It originally appears in *Tractatus maior* 2.71. In the printed editions it can be found at 3.1, fol. 52^{rb} lines 25–32, and is repeated at 3.30, fol. 61^{rb} lines 4–11.

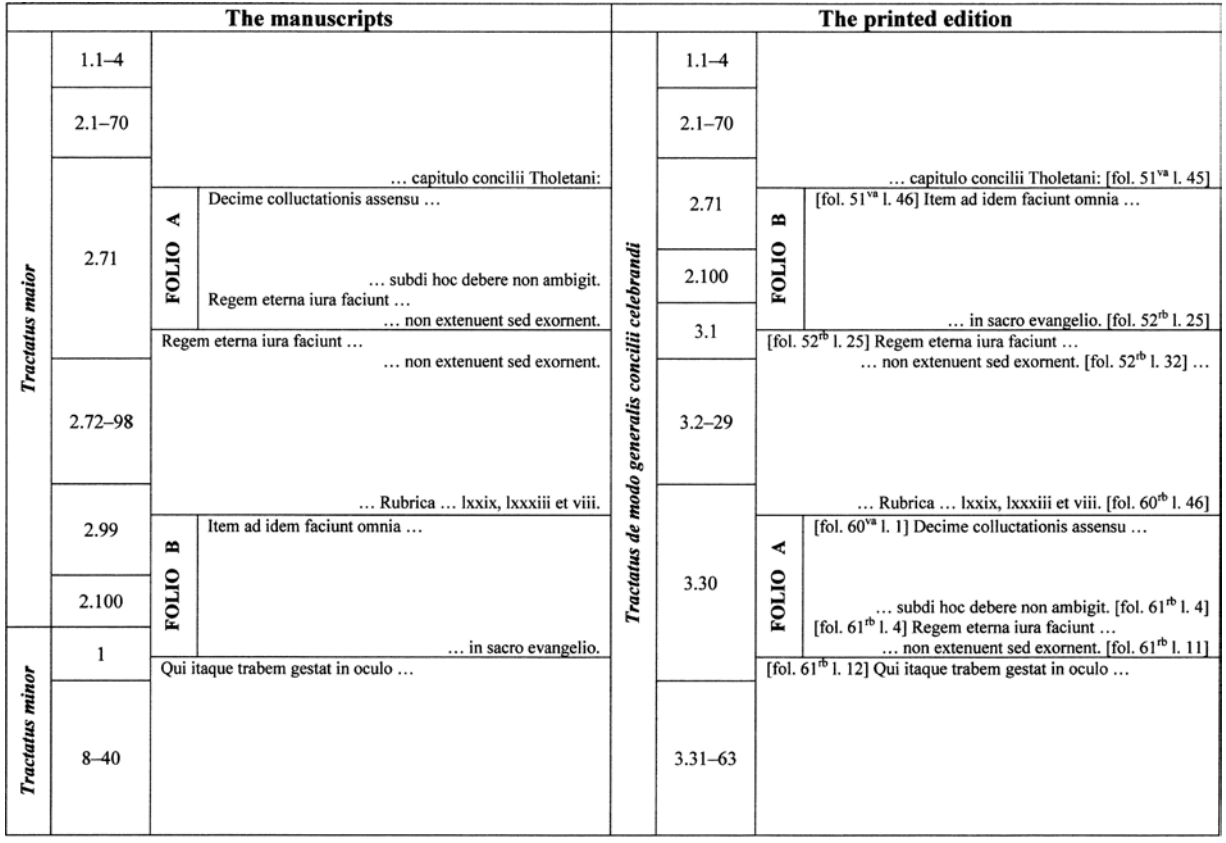
The manuscripts
The printed edition
Tractatus maior
Tractatus minor
Tractatus de modo generalis concilii celebrandi
1.1–4
2.1–70
2.71
2.72–98
2.99
2.100
1
8–40
3.1
3.2–29
3.30
3.31–63
… capitulo concilii Tholetani:
FOLIO A
Decime colluctationis assensu …
… subdi hoc debere non ambigit.
Regem eterna iura faciunt …
… non extenuent sed exornent.
Regem eterna iura faciunt …
… non extenuent sed exornent.
… Rubrica … lxxix, lxxxiii et viii.
FOLIO B
Item ad idem faciunt omnia …
… in sacro evangelio.
Qui itaque trabem gestat in oculo …
… capitulo concilii Tholetani: [fol. 51va l. 45]
FOLIO B
[fol. 51va l. 46] Item ad idem faciunt omnia …
… in sacro evangelio. [fol. 52rb l. 25]
[fol. 52rb l. 25] Regem eterna iura faciunt …
… non extenuent sed exornent. [fol. 52rb l. 32] …
… Rubrica … lxxix, lxxxiii et viii. [fol. 60rb l. 46]
FOLIO A
[fol. 60va l. 1] Decime colluctationis assensu …
… subdi hoc debere non ambigit. [fol. 61rb l. 4]
[fol. 61rb l. 4] Regem eterna iura faciunt …
… non extenuent sed exornent. [fol. 61rb l. 11]
[fol. 61rb l. 12] Qui itaque trabem gestat in oculo …

FIGURE 2 *The Transposition of Two Passages in the Printed Edition Lyon, 1531*

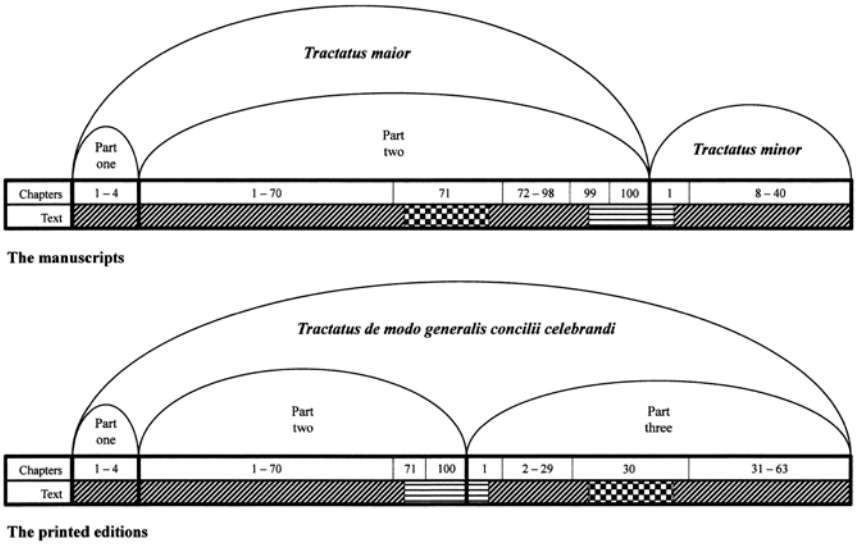

FIGURE 3 *The Manuscripts Compared with the Printed Editions*

of the text into parts and chapters, now in the renumbered form. The third columns shows the new arrangement of the text, with passages A and B transposed. For the sake of verification, the texts have here also been identified by folio, column, and line of the editio princeps. Figure 3 shows the same state of affairs in a graphic representation of the different sequencing of text and chapters in the manuscripts and the printed editions.[90]

{It is worth adding that Tours, Bibliothèque Municipale, ms. 237, breaks off in the middle of a sentence at *Tractatus maior* 2.71, fol. 51va line 10, only thirty-six lines before the beginning of section B in the printed editions. This is unlikely to be a coincidence. Dorange, *Catalogue descriptif*, 134, nr. 237, describes the manuscript as perfectly preserved in its original binding, and the writing ends in the middle of the page. That makes it hard to believe that Tu was directly involved in the events that led to the transposition. But it does suggest that Tu was closely related to the manuscript, or a fragment of the manuscript, that caused the transposition to occur.

It is similarly striking that the five surviving manuscripts containing the *Tractatus maior* but not the *Tractatus minor*—Kues, St. Nikolaus Hospital, ms. 168; Paris, Bibliothèque Mazarine, ms. 1687; Troyes, Bibliothèque Municipale, ms. 786; Vatican City, Biblioteca Apostolica Vaticana, ms. Barb.

90 {For a concordance of the numbering of parts and chapters in the manuscripts and the printed editions see Table 4 below, pp. 191–2.}

lat. 1487; and Rome, Biblioteca Nazionale Centrale, ms. Fondo Varia 1—all break off at the same point, in the middle of a sentence at *Tractatus maior* 2.100, fol. 51^{vb} line 12, only thirteen lines after the beginning of section B. That suggests that C, Ma, Tr, B, and R are equally closely related to the manuscript that was involved in the transposition.

There are three distinct facts that need explaining: (1) in the printed editions section B begins only a few lines after the point where Tu ends; (2) section B ends only a few lines before the point where C, Ma, Tr, B, and R end; (3) and all six of these manuscripts break off in the middle of a sentence. These manuscripts thus offer tantalizing clues to the process by which the transposition of passages must have occurred in one of their common ancestors. But I must confess that I have not been able to imagine any sequence of events that would explain how these facts are related to the rearrangement of the text in the printed editions.}

This account may then be a reasonable explanation of the state of the text in the printed editions. There is, however, one difficulty: Jean Crespin, the editor of the editio princeps, states clearly that he used two manuscripts,[91] {312 | 313} and it seems highly unlikely that both of these should have derived from the faulty version whose origin has just been described.[92] One of Crespin's two texts was probably sound: Why then did he take the corrupt version as his copy-text? Crespin says that the second manuscript came to his attention through a friend, long after his discovery of the first. Perhaps the printing process had been all but completed when the second manuscript arrived and there was no time to study it carefully. Perhaps the second version, *exemplar paulo emendatius*, was incomplete, like the manuscript in Tours, Bibliothèque Municipale, ms. 237, which breaks off in the middle of *Tractatus maior* 2.71 and could thus not have been used to correct the errors introduced in Crespin's copy-text.

Whatever may have led Crespin to print such an unsatisfactory text, the confusion surely originated in a manuscript. Only two or more successive operations can explain the transition from the original to the corrupt state of the text: first, the actual exchange of folios and, second, the renumbering of chapters. Thus, an accident in the printing process alone, such as an exchange of two printing plates, cannot have been the cause of the confusion. That a

91 See his preface, fol. 2^{r}. Having described his discovery of one, and his prolonged, but unsuccessful, search for another manuscript, Crespin continues: "Pervenit tandem ad nos, ductu cuiusdam optimi viri alterum exemplar paulo emendatius, utrumque alteri contulimus."

92 All the extant manuscripts reflect the original version. There is no evidence that one of them was used by Crespin.

detached sheet in a medieval manuscript must have caused the trouble and that Crespin's edition was based on a descendant of that manuscript remains highly probable.

The defective version of Durant's treatise as well as the mistaken attribution to the elder Durant were reproduced by all subsequent editions. The editio princeps may thus be considered the common ancestor of all printed editions. However, even more changes were introduced in the editions of Paris, 1545, and its two descendants, Venice, 1562, and Paris, 1671. The editions of Paris, 1545, and Paris, 1671, have been very widely used in scholarly studies of William Durant, and, since the version of 1671 has recently been reprinted in London (1963?), their text will be the most readily available until a new, critical edition appears.[93] It may therefore be useful to conclude this survey of the printed editions with a few remarks on their varying degrees of reliability. Philippe Le Preux (Philippus Probus), the editor of Paris, 1545, took considerable liberties with his text.[94] He completely changed the arrangement of part one of the *Tractatus maior* and, in the process, omitted the headings of chapters three and four, in which some demands {313 | 314} essential for Durant's plans were aptly summarized.[95] He consistently used *titulus* instead of *rubrica*, and he changed

93 Tierney, *Foundations*, 134n1, and Vereecke, "Réforme de l'église," 287n13, used the edition of Paris, 1545. The edition of Paris, 1671, was used by Heber, *Gutachten*, 4on6; Viollet, "Guillaume Durant," 82n1; E. Müller, *Vienne*, 498n28, 570n21; Bellone, "Cultura e studi," 68n2; and Torquebiau, "Gallicanisme," 271n1. The only scholar who used the editio princeps seems to have been Rivière, *Problème*, 363n3. Otherwise the text in the *Tractatus universi iuris* is frequently employed, as by Jedin, *Geschichte*, 1:471n5; Haller, *Papsttum und Kirchenreform*, 58n1; Scholz, *Publizistik*, 209n2; and Posch, "Reformvorschläge," 294nn3–4.

94 Presumably Le Preux had a copy of the edition of Lyon, 1531, the only edition known to have been available in 1545.

95 Chapters 2 and 3 were amalgamated. The *Rubrica de limitanda potestate superiorum* was combined with chapter 4 to form a new chapter 3. The *Rubrica de dispensationibus* became chapter 4, and the *Rubrica de exemptionibus* chapter 5. Thus there are five chapters and no unnumbered rubrics. In the editio princeps the chapter headings of chapters 3 and 4 read as follows: "Quod predictus modus correctionis et reformationis ecclesie et christianitatis sit conveniens rationi et iuri, maxime quantum ad presidentes spirituali et temporali potestati, et quod non debeant transgredi iura sed se regere et limitare secundum ea et non querere que sua sunt sed que Christi, nec aliorum iura usurpare sed sub ratione se regere. Et additur qualiter ab antiquo res publica gubernabatur." *Tractatus maior* 1.3, fol. 5ra lines 16–26. "Quarto specificatur amplius de limitando et regulando exercitio potestatis dictorum presidentium monarchie ne in agendis absque concilio proborum proprio utantur arbitrio, nec sine generali concilio <agant> [P] contra ea que sunt in conciliis a sanctis patribus provide constituta in dispensationibus, privilegiis, et exemptionibus, et

the number of *Tractatus maior* 2.100 to what appeared to be the more logical 2.72. The number of smaller changes to, insertions in, and omissions from the text of the editio princeps is considerable.[96] Most of them have no great importance, but occasionally they affect vital points of interpretation.[97] These changes were probably not wholly accidental but were perhaps influenced by Le Preux's desire to gain the favor of Pope Paul III and the Council of Trent, to whom he dedicated his edition.[98] All the features of Le Preux's {314 | 315} version were repeated in the editions of Venice 1562 and Paris 1671, and a number of new errors were introduced, especially in references to canon law.

The available editions may thus be arranged in two groups: the first, comprising the editions of Lyon, 1531, Lyon, 1549, and Venice, 1584, is by far the more reliable one; the second comprises the editions of Paris, 1545, Venice, 1562, and Paris 1671. For the reasons stated above, it must be used with caution. In both groups the older editions are more reliable than the more recent ones, and it is therefore unfortunate that the latest edition of all was chosen for the reprint that appeared in the 1960s.

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aliis exercendis; quod revocent et revocare debeant exemptiones in contrarium concessas, cum hoc esse utile et rationabile videatur." *Tractatus maior* 1.4, fol. 7^{ra} line 40–7^{rb} line 7. This last text is crucial for an appreciation of the extent of Durant's plan for reform. It is difficult to understand its absence from all printed editions except the editio princeps.

96 Examples of some small changes can be found at fols. 4^{vb} line 19 (*inferri* for *fieri*), 4^{vb} line 34 (*auctoritate* for *auctoritas*), 5^{rb} line 16 (omission of *quod predictum est*), and 5^{ra} line 27 (*S. D. Papa* for the simpler *dominus Papa*).

97 See, for example, the following text, one of the most important passages in the entire work: "Quod contra dicta concilia et iura nihil possent de novo statuere vel concedere nisi generali concilio convocato." *Tractatus maior* 1.4, fol. 7^{rb} lines 40–3. This text has been quoted in its context above, n. 44. The edition of 1545 reads *statuere vel condere* instead of *statuere vel concedere*. This is a vital difference: *Statuere vel condere* would mean that Durant envisioned nothing more than the regular participation of general councils when new law was to be formally established. But if *statuere vel concedere* is the correct version, Durant wanted conciliar participation, not only when new law was made (*statuere* or *condere leges*), but also when concessions within the framework of existing law were being considered. *Concedere* may mean any number of papal administrative measures changing the law or its effects for particular reasons, e.g., exemptions, dispensations, privileges, all of which were part of the everyday business of the curia. If *statuere vel concedere* is the correct version, and both the editio princeps and the manuscripts support it, then Durant wanted more than conciliar participation on those relatively rare occasions when new law was being formulated. For the meaning of the terms *condere, concedere*, and *statuere* see the parallels from Roman law in Heumann, *Handlexikon*, 85, 88, 553–4.

98 See his preface, sig. aii.

4 Conclusion

The confusion found in the printed editions has seriously affected previous studies of the *Tractatus de modo generalis concilii celebrandi.* It is above all responsible for charges that the bishop of Mende neglected to give any meaningful order to his material.[99] The widespread view that the two *Tractatus* are a mere heap of thousands of quotations indiscriminately thrown together by an author admittedly learned, but wholly unconcerned with sparing his readers needless repetitions, is simply not true. The two *Tractatus* are carefully arranged, and the structure of the *Tractatus maior* in particular is an important ingredient in Durant's argument for conciliar participation in papal legislation. A detailed study of the text would show, furthermore, that there is hardly any quotation in the entire book which is not precisely calculated to fit into a context apart from which it cannot be fully understood. It is in the well thought-out order of his quotations more than anything else that Durant demonstrated his mastery of canon law.[100]

The uncritical use of the printed editions has had even more serious consequences than unjustified attacks on Durant's ability to write clearly. Convinced that a lack of order, as suggested by the editions, was characteristic of his thought as well as his work, scholars have failed to pay due attention to the signs of order which persisted even in their corrupted texts. As a result {315 | 316} the vital collection of conciliar canons found in the first canons of the chapters of part two of the *Tractatus maior* has invariably escaped notice.[101] Its discovery makes clear Durant's vision of the essence of his plan for the *reformatio in capite et membris.* Combined with the knowledge that Durant, aware of the complexity of his book, composed a thorough summary of its contents, it also helps to reveal the precise nature of the *Tractatus maior*: a handbook of laws for the reform of the church, based on Pseudo-Isidore's collection of canon law

99 Such charges can be found in Rivière, *Problème*, 363; Posch, "Reformvorschläge," 289; Torquebiau, "Gallicanisme," 275–6; E. Müller, *Vienne*, 609–10; Tierney, *Foundations*, 191; and above all in Viollet, "Guillaume Durant," 80, 85, 87, 101, 110, 117, and 82: "Dans son ensemble, l'œuvre est confuse et hâtive; ce sont, pourrait-on dire, des notes jetées comme en courant."

100 The prologue of the *Tractatus maior* is perhaps the best brief example of Durant's ability to express his ideas by using quotations from canon law to create a coherent context.

101 Even in the editions, the plan according to which the *Tractatus maior* was arranged was still explained in the preface to part two, and carefully followed up to *Tractatus maior* 2.71.

and submitted to the Council of Vienne for consideration in its efforts to renew or reform the church.

Durant's own program of reform can now be identified as a manageable list of less than a hundred conciliar canons.[102] With this list in hand it should not be difficult to discover whether or not later conciliar thinkers used Durant's handbook in their writings, and to determine the extent to which his book influenced their work.

Recognition of the *Tractatus minor* as a separate work suggests another line of research. It is now possible not only to compare two versions of the proposals made by Durant, but also to reconsider their influence on the legislation of the Council of Vienne.[103] Such an investigation might clarify the difference in the roles played by the two books at Vienne.

These considerations, however, lead beyond the concerns of the present article, which is above all intended to open up new sources of information and to provide a sound basis for studying a major early conciliar thinker. To complete such a project, however, a critical edition of his *Tractatus de modo generalis concilii celebrandi* will be essential.[104]

102 More than a hundred if one includes the twenty-six canons from the *Canones apostolorum* quoted in the body of *Tractatus maior* 2.1. See above, n. 53.

103 E. Müller, *Vienne*, 594–5, already dealt with this subject and concluded against Haller, *Papsttum und Kirchenreform*, 65–6, that the bishop doubtless influenced the measures decided upon by the Council of Vienne. It may prove to be significant that, except for a single case (615n14), all of Müller's evidence for Durant's efforts is taken from the *Tractatus maior*. See below, chap. 6.

104 I am planning to undertake both a detailed study and a critical edition.

TABLE 1 *Schematic Table of Contents of the Tractatus maior*

Preface

Part One: The Theory of Reform

The Object of Reform: The Church ..... chap. 1
The Pattern of Reform: The Law ..... chap. 2
The Relationship of Government and Law ..... chap. 3
Rubrica de limitanda potestate superiorum: The Relationship of Government and Reason in Theory and History
The Plan of Constitutional Reform ..... chap. 4
Rubrica de dispensationibus
Rubrica de exemptionibus

Part Two: Outline and Evidence for the Proposed Reform

Preface and Introduction

(A) Historical Survey of Ancient Conciliar Law with Parallels[105]

Excerpts from *Canones apostolorum* ..... chap. 1

Excerpts from *De primitiva ecclesia et sinodo Nicena*
———, c. 9 ..... chap. 2
———, cc. 9 and 11 ..... chap. 3
———, VI 3.2.1 to be revoked ..... chap. 4
———, c. 10 ..... chap. 5
———, c. 12 ..... chap. 6
———, c. 12 ..... chap. 7
———, c. 12 ..... chap. 8

Donatio Constantini ..... chap. 9

Concilia Graeca

Nicaenum, c. 3 ..... chap. 10
———, c. 5 ..... chap. 11

105 Where appropriate, the introductory canon of the chapter is specified.

Ancyranum, c. 24 ..... chap. 12
Neocaesariense, c. 11 ..... chap. 13
———, c. 14 ..... chap. 14
———, c. 13 ..... chap. 15
Sardicense, c. 14 ..... chap. 16
Antiochenum, c. 11 ..... chap. 17
Laodicaenum, c. 3 ..... chap. 18
———, c. 15 ..... chap. 19
Chalcedonense, c. 2 ..... chap. 20
———, c. 10 ..... chap. 21
———, c. 18 ..... chap. 22
———, c. 21 ..... chap. 23
———, c. 26 ..... chap. 24

Concilia Africae

I *Carthaginense*, c. 3 ..... chap. 25
———, c. 8 ..... chap. 26
———, c. 14 ..... chap. 27
II *Carthaginense*, c. 7 ..... chap. 28
———, c. 13 ..... chap. 29
III *Carthaginense*, c. 3 ..... chap. 30
———, c. 7 ..... chap. 31
———, c. 11 ..... chap. 32
———, c. 19 ..... chap. 33
———, c. 26 ..... chap. 34
———, c. 30 ..... chap. 35
———, c. 31 ..... chap. 36
———, c. 49 ..... chap. 37
IV *Carthaginense*, c. 14 ..... chap. 38
———, c. 93 ..... chap. 39
V *Carthaginense*, c. 9 ..... chap. 40
Millevitanum, c. 9 ..... chap. 41

Concilia Galliae

I *Arelatense*, c. 7 ..... chap. 42
Regiense, c. 5 ..... chap. 43
Arausicanum, c. 1 ..... chap. 44
———, c. 5 ..... chap. 45

———, c. 23 ..... chap. 46
Vasense, c. 4 ..... chap. 47
Agathense, c. 18 ..... chap. 48
———, c. 36 ..... chap. 49
———, c. 47 ..... chap. 50
———, c. 55 ..... chap. 51
———, c. 38 ..... chap. 52
———, c. 38[106] ..... chap. 53
Vasense, c. 3 ..... chap. 54
Agathense, c. 66 ..... chap. 55

Concilia Hispaniae

Elibertanum, c. 26 ..... chap. 56
———, c. 36 ..... chap. 57
———, c. 35 ..... chap. 58
———, c. 47 ..... chap. 59
———, c. 48 ..... chap. 60
———, c. 50 ..... chap. 61
———, c. 79 ..... chap. 62
———, c. 81 ..... chap. 63
Tarraconense, c. 4 ..... chap. 64
———, c. 7 ..... chap. 65
———, c. 8 ..... chap. 66
———, c. 10 ..... chap. 67
Gerundense, c. 1 ..... chap. 68
I *Caesaraugustanum*, c. 1 ..... chap. 69
I *Toletanum*, c. 11 ..... chap. 70
St. Augustine, as in C. 22 q. 5 c. 19[107] ..... chap. 71
See Giles of Rome, *De ecclesiastica potestate* ..... chap. 72

106 Chaps. 52–4 all concern clerics or monks who leave their appointed diocese without permission. That may help to explain why Agathense c. 38 figures at the beginning of chap. 52 and again at the beginning of chap. 53, and why Vasense c. 3 is quoted at the beginning of chap. 54, in the midst of a series of canons from the council of Agde consisting of chaps. 48–55, instead of preceding Vasense c. 4 in chap. 47.

107 The interruption in the regular succession of conciliar canons in chaps. 71 and 72 may be explained as a consequence of the fact that they continue to deal with the same subject as chap. 70, i.e., the conduct of secular government, as indicated by the chapter titles: chap. 70, *De regibus ecclesiam perturbantibus*; chap. 71, *De fidelitate regibus servanda*; chap. 72, *De his que imperatores . . . intra ecclesiam agere possunt*.

I *Toletanum*, c. 21 ..... chap. 73
III *Toletanum*, c. 7 ..... chap. 74
———, c. 22 ..... chap. 75
IX *Toletanum*, c. 10 ..... chap. 76
XI *Toletanum*, c. 14 ..... chap. 77
I *Bracarense*, c. 7 ..... chap. 78
———, c. 9 ..... chap. 79
———, c. 18 ..... chap. 80
Capitula Martini, c. 48 ..... chap. 81
———, c. 50 ..... chap. 82

Decreta Urbani (correct: *ex Gestis Silvestri*) ..... chap. 83

(B) Supplement: Laws Concerning Preponderantly Contemporary Matters

De quaestoribus . . . Romanae curiae ..... chap. 84
De ordinibus mendicantium ..... chap. 85
De leprosis ..... chap. 86
De validis mendicantibus . . . et invalidis ..... chap. 87
De hospitalitatibus . . . in locis in quibus de bonis ecclesiasticis religiosorum fieri possunt construendis ..... chap. 88
De poena sacrilegorum in pios usus convertenda ..... chap. 89
De decimis et primitiis ..... chap. 90
De provisione . . . vicariis ecclesiarum ad religiosos . . . pertinentium facienda ..... chap. 91
De abbatibus, prioribus, et religiosis domibus ..... chap. 92
De providentia circa gubernationem reipublicae adhibenda in mutationibus monetarum ..... chap. 93
Ne ad ecclesiastica beneficia recipiantur . . . illi quorum propinqui iniuriarentur ecclesiis ..... chap. 94
De potestate ecclesiastica super temporales dominos ..... chap. 95

(C) Summary and Index

De reformatione Romanae ecclesiae ..... chap. 96
De reformatione praelatorum ..... chap. 97
De reformatione cleri ..... chap. 98
De reformatione religiosorum ..... chap. 99
De reformatione regum et saecularium personarum ..... chap. 100

TABLE 2 *Cross-References in the Summary of the* Tractatus maior

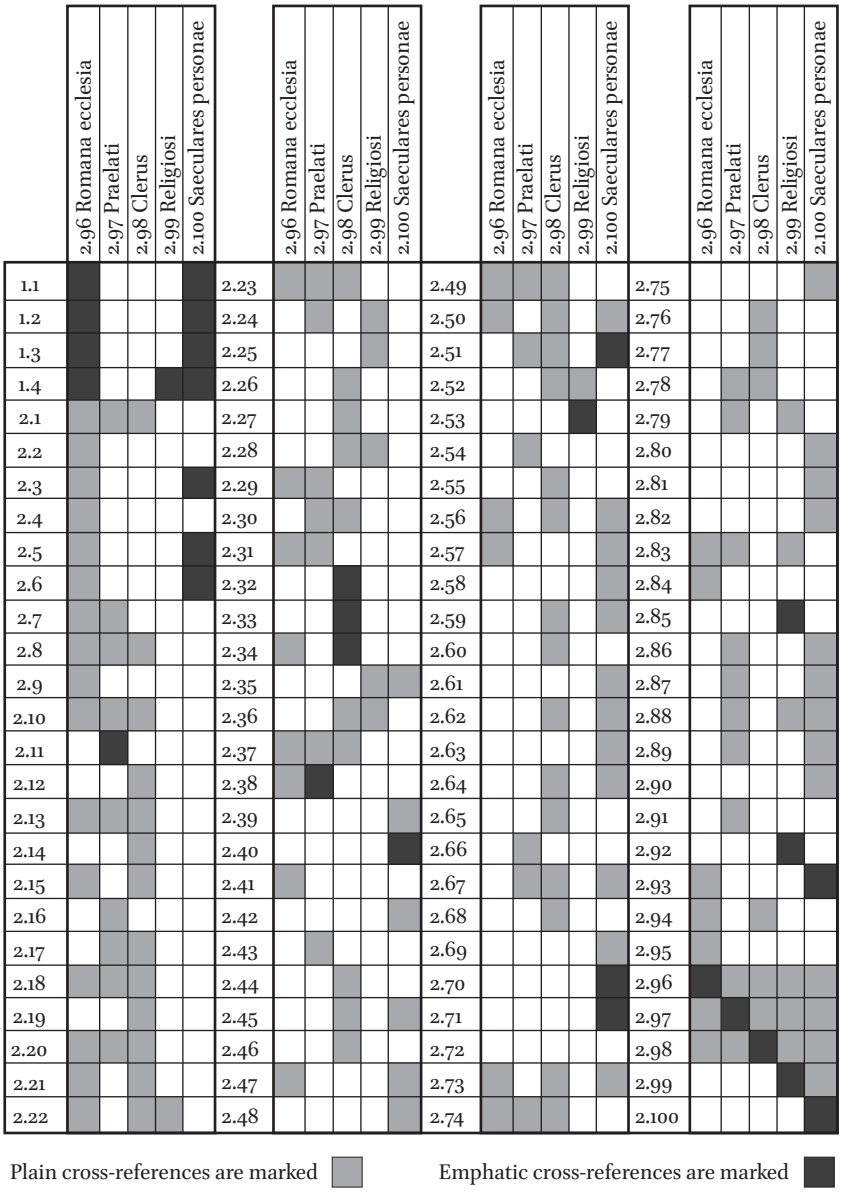

TABLE 3 *Schematic Table of Contents of the* Tractatus minor

(A) *De reformatione universalis ecclesiae*

De reformatione universalis ecclesiae, et quod in ea est primo a capite, sancta Romana ecclesia, praelatis, et aliis superioribus inchoandum ..... chap. 1

De modo generali per quem universalis ecclesia deberet reformari, scilicet ut servarentur iura et revocarentur in contrarium attemptata ..... chap. 8[108]

De <tertio> [P] modo reformationis ecclesiae, scilicet ut mala exempla resecarentur ..... chap. 9

(B) *De malis exemplis*

De avaritia: Ericius ..... chap. 10

De superbia: Draco ..... chap. 11

De luxuria: Pilosus ..... chap. 12

De gula: Milvus ..... chap. 13

De invidia: Lamia ..... chap. 14

De ira: Onocentaurus ..... chap. 15

De acedia: Struthio ..... chap. 16

(C) *De remediis*

(C.1) *De negligentia circa eruditionem*

Primum remedium: regula apostolica in praelatis promovendis servetur ..... chap. 17

Secundum remedium: de negligentia eruditionis in curatis ..... chap. 18

Tertium remedium: de negligentia eruditionis in universo clero ..... chap. 19

De beneficiis ecclesiasticis unde posset pauperibus magistris et scholaribus provideri ..... chap. 20

Quartum remedium: quod clerici lectioni attenderent et doctrine ..... chap. 21

Quintum remedium: ut specificaretur et declararetur quae scientia litterarum est in singulis gradibus requirenda ..... chap. 22

108 If the chapter numbering in the manuscripts is correct, chaps. 2–7 must be considered missing. Cf. above, p. 173.

(C.2) *De negligentia circa curam animarum*

Prima negligentia: ecclesia Romana causas electionum ad se trahit et ecclesiae remanent viduatae ..... chap. 23
Secunda negligentia: praelati et curati non resident ..... chap. 24
Tertia negligentia: cura animarum inhabilibus committitur ..... chap. 25
Quarta negligentia: publice peccatores nullo modo vel insufficienter puniuntur ..... chap. 26

(C.3) *De negligentia circa ecclesiasticum officium et cultum divinum*

Prima negligentia: de negligentia praelatorum et curatorum ecclesiasticorum ..... chap. 27
Secunda negligentia: de negligentia canonicorum et aliorum ..... chap. 28
Tertia negligentia: de negligentia principum et populi ..... chap. 29
Quarta negligentia: festa non coluntur ..... chap. 30
Quinta negligentia: quod officium distincte horis competentibus sine motetis dicatur ..... chap. 31
Quod officium Romanae ecclesiae ubique dicatur ..... chap. 32
Quod in quacunque provincia officium uniformiter est dicendum ..... chap. 33
Quod regulares relinqui possunt ceremoniis suis quo ad officium divinum ..... chap. 34
Sexta negligentia: de negligentia in defectu ornamentorum ..... chap. 35
Septima negligentia: laici et insacrati homines reliquias et deo dicata ornamenta contingunt ..... chap. 36
De negligentia circa reparationem ecclesiae ..... chap. 37
De negligentia circa defensionem ecclesiasticorum iurium et subditorum ..... chap. 38
De negligentia praelatorum et beneficiatorum circa dispensationem proventuum ..... chap. 39
Quomodo proventus ecclesiastici communiter in usus vanos vel illicitos expenduntur ..... chap. 40

TABLE 4 *Concordance of the Manuscripts and the Printed Editions*

***TRACTATUS MAIOR* Part One**

Manuscripts	**Crespin's Edition 1531**	**Le Preux's Edition 1545**
Preface	Preface	Preface
1.1	1.1	1.1
1.2	1.2	1.2
1.3	1.3	
De limitanda potestate	De limitanda potestate	1.3 De limitanda potestate
1.4	1.4	
De dispensationibus	De dispensationibus	1.4 De dispensationibus
De exemptionibus	De exemptionibus	1.5 De exemptionibus

***TRACTATUS MAIOR* Part Two**

MSS	**EDS**	**MSS**	**EDS**	**MSS**	**EDS**	**MSS**	**EDS**	**MSS**	**EDS**	**MSS**	**EDS**
Pref.	Pref.	2.18	2.18	2.36	2.36	2.54	2.54	2.71.b	**3.30.b**	2.87	3.18
2.1	2.1	2.19	2.19	2.37	2.37	2.55	2.55	2.71.c	3.1.b	2.88	3.19
2.2	2.2	2.20	2.20	2.38	2.38	2.56	2.56	2.71.d	3.2	2.89	3.20
2.3	2.3	2.21	2.21	2.39	2.39	2.57	2.57	2.72	3.3	2.90	3.21
2.4	2.4	2.22	2.22	2.40	2.40	2.58	2.58	2.73	3.4	2.91	3.22
2.5	2.5	2.23	2.23	2.41	2.41	2.59	2.59	2.74	3.5	2.92	3.23
2.6	2.6	2.24	2.24	2.42	2.42	2.60	2.60	2.75	3.6	2.93	3.24
2.7	2.7	2.25	2.25	2.43	2.43	2.61	2.61	2.76	3.7	2.94	3.25
2.8	2.8	2.26	2.26	2.44	2.44	2.62	2.62	2.77	3.8	2.95	3.26
2.9	2.9	2.27	2.27	2.45	2.45	2.63	2.63	2.78	3.9	2.96	3.27
2.10	2.10	2.28	2.28	2.46	2.46	2.64	2.64	2.79	3.10	2.97	3.28
2.11	2.11	2.29	2.29	2.47	2.47	2.65	2.65	2.80	3.11	2.98	3.29
2.12	2.12	2.30	2.30	2.48	2.48	2.66	2.66	2.81	3.12	2.99.a	3.30.a
2.13	2.13	2.31	2.31	2.49	2.49	2.67	2.67	2.82	3.13	2.99.b	**2.71.b**
2.14	2.14	2.32	2.32	2.50	2.50	2.68	2.68	2.83	3.14	2.100	**2.100**
2.15	2.15	2.33	2.33	2.51	2.51	2.69	2.69	2.84	3.15		
2.16	2.16	2.34	2.34	2.52	2.52	2.70	2.70	2.85	3.16		
2.17	2.17	2.35	2.35	2.53	2.53	2.71.a	2.71.a	2.86	3.17		

Passages marked in bold face were transposed in the printed editions.

(*Continued*)

TABLE 4 (*Continued*)

TRACTATUS MINOR

MSS	EDS	MSS	EDS	MSS	EDS	MSS	EDS	MSS	EDS	MSS	EDS
1.a	**3.1.a**	12	3.35	18	3.41	24	3.47	30	3.53	36	3.59
1.b	3.30.c	13	3.36	19	3.42	25	3.48	31	3.54	37	3.60
8	3.31	14	3.37	20	3.43	26	3.49	32	3.55	38	3.61
9	3.32	15	3.38	21	3.44	27	3.50	33	3.56	39	3.62
10	3.33	16	3.39	22	3.45	28	3.51	34	3.57	40	3.63
11	3.34	17	3.40	23	3.46	29	3.52	35	3.58		

Passages marked in bold face were transposed in the printed editions.

CHAPTER 3

Research on William Durant the Younger's *Tractatus de modo generalis concilii celebrandi*: A Critical Review

As far as we can tell, research on the *Tractatus de modo generalis concilii celebrandi* began in 1869.[1] That may seem strange, for 1869 was also the year in which the First Vatican Council met. At that council the Catholic Church not only celebrated a highpoint in its rapid revival following on the losses it had suffered during the French Revolution, but also issued decrees that are, at least on a common understanding, diametrically opposed to the ideas of William Durant the Younger, bishop of Mende from 1296–1330.[2] Durant, after all, is best known for having insisted on one particular proposal for the reform of the church among the many he submitted to the Council of Vienne (1311–12) in his *Tractatus*: that the pope {205 | 206} ought no longer to be permitted to pass or alter any laws without having consulted a general council, and that such

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* Originally published as "Die Erforschung von Wilhelm Durant d. J. *Tractatus de modo generalis concilii celebrandi*: Eine kritische Übersicht," *Annuarium historiae conciliorum* 12 (1980): 205–28.

1 Earlier treatments, such as *Gallia Christiana*, 1:96–7, need not be treated here because they barely mention the *Tractatus de modo generalis concilii celebrandi* and their effect on modern research has been negligible. I shall also refrain from analyzing studies devoted exclusively to Durant's life, such as Göller, "Geschichte der italienischen Legation," and articles in standard works of reference, such as Naz, "Guillaume Durand," and Mollat, "2. Durant (Guillaume)." I shall focus first and foremost on source-based research that has had a significant impact on the interpretation of Durant's treatise.

2 Concerning church history in the nineteenth and twentieth centuries, I should like to refer once and for all to Jedin, ed., *Handbuch der Kirchengeschichte*, vols. 6–7. Jedin, *Kleine Konziliengeschichte*, provides an introduction to the history of general councils. Unfortunately there is no good treatment of ecclesiastical historiography from a Catholic perspective. For the time being the remarks and bibliographical references in Jedin, ed., *Handbuch der Kirchengeschichte*, 1:44–55, 6/2:261–4, 328–34, 7:283–6, will have to do. The history of Protestant ecclesiastical historiography by Meinhold, *Geschichte der kirchlichen Historiographie*, is similarly insufficient for our purposes. That makes it necessary to rely largely on biographical information in dissertations, bibliographies, and biographical dictionaries. For accounts of the historiography of conciliarism see Bäumer, "Erforschung des Konziliarismus," and Alberigo, "Movimento conciliare."

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councils were to meet every ten years.[3] It is true that there still is no convincing and comprehensive interpretation of the theories behind Durant's demand. The present study is only a preliminary step towards such an interpretation. Nonetheless, at least this much is certain: not only the ten-year period, but also Durant's entire understanding of the role of popes and councils amount to a striking anticipation of the decrees *Haec sancta* and *Frequens* that were passed by the Council of Constance more than a hundred years later, however much this judgment may need to be qualified in detail.[4]

That brings us to the point at hand, for if anything can be said to characterize the history of the Catholic Church in the decades leading up to the First Vatican Council, it is increasing hostility towards so-called liberals in the church and criticism of movements in favor of councils or movements understood to have been inspired by democratic tendencies more broadly speaking. Such increasing hostility and criticism are well reflected in Denzinger's decision not to include *Haec sancta* and *Frequens* in the first edition of his paradigmatic *Enchiridion symbolorum* of 1854,[5] and were given pronounced expression in Pope Pius IX's famous Syllabus of Errors of 1864. The positive correlate of this negative attitude to democracy was an insistence on the singular importance of absolute papal monarchy that, after heated debates, achieved a decisive victory at the First Vatican Council culminating in the declaration of papal infallibility and the definition of papal primacy. No wonder that research into the history of the conciliar movement and late medieval councils suffered for many years thereafter.[6]

The reason why this study must nonetheless begin in 1869 is a book that was published in Leipzig that year under the title *Der Papst und das Concil*. It was written under the pseudonym Janus by Johann Joseph Ignaz von Döllinger

3 Durant, *De modo generalis concilii celebrandi tractatus*, ed. Crespin, 1.4, fol. 7^{r}, 3.27, fol. 59^{r}. Unless indicated otherwise, all quotations are taken from this edition of Durant's *Tractatus*. Various reasons can be adduced to justify spelling Durant's name 'Durandus,' 'Durantis,' 'Duranti,' and 'Durant' or 'Durand,' all of which are forms that have in fact been used; cf. Heber, *Gutachten*, 65; Andrieu, *Pontifical romain*, 3:3n1; and Viollet, "Guillaume Durant," 2n2. For the purely pragmatic sake of international uniformity I prefer 'Durant,' the form used by Durant's biographer Viollet.

4 The text of *Haec sancta* and *Frequens* can be found in *Conciliorum oecumenicorum decreta*, 409–10, 438–43.

5 Alberigo, "Movimento conciliare," 914, 950. Cf. Denzinger, ed., *Enchiridion symbolorum* (1854), often reissued with various revisions, most recently Denzinger, ed., *Enchiridion symbolorum* (2010).

6 Jedin, ed., *Handbuch der Kirchengeschichte*, 1:45, 6/2:333.

(1799–1890), "doubtless the most learned church historian of his time."[7] Döllinger had been trained in the school of Tübingen and {206 | 207} studied with Möhler, among others. By 1869 a large number of books he had published during his tenure as professor in Munich had already proved him to be an outspoken opponent of Jesuits and Ultramontanism.[8] As soon as he got wind of the issues that were to be debated at the First Vatican Council, he had written a series of anonymous articles in the *Augsburger Allgemeine Zeitung* that amounted to a sensational attack on any plans to raise papal infallibility to the level of Catholic dogma. "A fighter for the church with the weapons of history,"[9] he expanded his offensive in *Der Papst und das Concil*, which was written in great haste but massively documented with historical evidence.

Durant was the very first author whom Döllinger quoted in the section he devoted to "the judgments of contemporaries" (*Urtheile der Zeitgenossen*) on the papacy. He emphasized that Durant viewed the papal curia as the

> chief evil and cause of so many forms of corruption. . . . He goes on to list the most urgent reforms without which the church would sink ever more deeply into corruption; but at bottom *these are directed against the papal system as a whole as it had developed in the preceding two hundred years*, which explains why his book had no effects worth mentioning, even though the pope had asked for it and it had been meant to serve as a memorandum of reform for the Council of Vienne.[10]

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7 "Unbestritten der gelehrteste Kirchenhistoriker seiner Zeit." Jedin, ed., *Handbuch der Kirchengeschichte*, 1:44–5. On Döllinger there is a good bit of literature. The standard biography is Friedrich, *Ignaz von Döllinger*. The appreciation of Döllinger by his student Lord Acton, "Doellinger's Historical Work," is interesting, too. Cf. Vigener, *Drei Gestalten*. Döllinger was important enough to be treated in general surveys of historiography, as for example Thompson, *History of Historical Writing*, 2:537–9; Gooch, *History and Historians*, 503–5; and Srbik, *Geist und Geschichte*, 2:49–52. In our context Brandmüller, *Ignaz v. Döllinger*, is particularly relevant.

8 Consider works such as his *Geschichte der christlichen Kirche*, *Lehrbuch der Kirchengeschichte*, *Die Reformation*, *Papst-Fabeln des Mittelalters*, and *Beiträge zur Sektengeschichte*.

9 "Streiter für die Kirche mit den Waffen der Geschichte." Srbik, *Geist und Geschichte*, 2:49–50.

10 "Hauptübel und die Ursache so vieler Corruptionen. . . . Er zählt nun die nothwendigsten Reformen auf, ohne welche die Kirche immer mehr in Corruption versinken müsse; aber sie sind *im Grunde gegen das ganze päpstliche System, wie es seit 200 Jahren geworden war, gerichtet*, und so ist denn von seinem Buche, obgleich es der Papst begehrt hatte und es als Denkschrift für das Concil von Vienne dienen sollte, keine irgend nennenswerte Wirkung ausgegangen." Döllinger, *Papst und Concil*, 241–3. My emphasis.

Döllinger's claim that Durant's proposals had no effects worth mentioning is false: Durant did in fact influence legislation passed by the Council of Vienne. That alone is sufficient to caution us against accepting his perspective on the bishop of Mende without reserve. But the point is that at a crucial historical moment Döllinger enlisted Durant as a radical enemy of the papacy.

Döllinger devoted only three pages of his book to Durant, but the brevity of his treatment should not obscure the significance of his observations. His book, as whose pseudonymous author he was quickly identified, attracted extraordinary interest because it amounted to a highly provocative rebellion by a greatly respected and influential Catholic scholar against the measures to be expected from the First Vatican Council. Döllinger openly espoused the liberal cause:

> We—and here the plural is not to be taken figuratively, but literally—{207 | 208} we avow our allegiance to an understanding of the Catholic Church and its mission that its enemies, employing a term that is often abused and whose lack of definition makes it only too convenient for polemical purposes, call 'liberal,' and that is utterly despised as such by all unconditional supporters of the Roman curia and the Society of Jesus—two forces that are closely allied nowadays—and which they never mention with anything but bitterness.[11]

Döllinger also minced no words about his judgment of the papacy:

> If one looks at it from the viewpoint of the ancient church from the days of the apostles down to about 845, what the papacy has become since that time looks like a disfiguring, pathological, and suffocating tumor on the organism of the church, stunting and corroding its vitality and bringing sundry scourges in its wake.[12]

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11 Ibid., IV–V: "Wir—und dieser Plural ist hier nicht figürlich, sondern buchstäblich zu nehmen—Wir bekennen uns zu derjenigen Auffassung von der katholischen Kirche und ihrer Mission, welche von den Gegnern mit einem oft missbrauchten und in seiner Unbestimmtheit für polemische Zwecke sehr bequemen Worte, die liberale genannt wird, welche als solche bei allen unbedingten Anhängern des römischen Hofes und des Jesuitenordens—zwei jetzt innig verbündeten Mächten—in völligem Verrufe steht, und von ihnen nie anders als mit Bitterkeit erwähnt wird."

12 Ibid., VIII–IX: "Sobald man sich auf den Standpunkt der alten Kirche, von der Apostelzeit an bis etwa zum Jahre 845 stellt, [erscheint] das Papstthum, wie es geworden, als ein entstellender, krankhafter und athembeklemmender Auswuchs am Organismus der Kirche,

Admittedly *Der Papst und das Concil* was rushed and failed to convince on every point of detail. "Nonetheless Janus came to be mined with growing enthusiasm in support of liberal and Protestant polemics against the Catholic Church."[13]

That was doubtless decisive for the manner in which Durant's *Tractatus de modo generalis concilii celebrandi* has been interpreted since then. Döllinger was the first to draw attention to Durant's treatise, and he did so in order to deploy him in a highly visible place as a witness against the abuses of the papacy. Whoever read Durant thereafter had to think of Döllinger, a man who had refused to submit to the decrees of the First Vatican Council, who had therefore been excommunicated on 17 April 1871, and who became not only a leader of the intellectual opposition in the age of the *Kulturkampf*, but also the spiritual father of Old Catholicism, even if he never did join the Old Catholics officially.[14] If one keeps this in mind and reckons with the difficulties with which the *Kulturkampf* and the modernism crisis confronted the Catholic Church soon after the First Vatican Council, one can well understand why no Catholic scholar published a serious treatment of Durant until 1921.

1 Protestant Studies

Around the turn of the century three significant contributions to research on Durant's *Tractatus* appeared within a space of only seven years.[15] It is hardly an accident that all three were written by Protestants: the two Saxons Max Heber and Richard Scholz, and the Baltic German Johannes Haller from Dagö. As will soon become apparent, all three shared the interpretation of Durant as a radical to which Döllinger had pointed the way. Since then Protestants have made no further contributions to research on William Durant the Younger's treatise. {208 | 209}

The first in this group was Max Heber from Falkenstein (1868–1940), son of a Saxon administrative official (*Bezirkssekretär*), who studied theology in Leipzig and philosophy and history in Marburg.[16] Heber, it seems, is known

der die besseren Lebenskräfte in ihr hemmt und zersetzt und selbst wieder mancherlei Siechthum nach sich zieht."

13 "Nichtsdestoweniger wurde der Janus nun mehr und mehr zur gern ausgeschöpften Fundgrube liberaler und protestantischer Polemik gegen die katholische Kirche." Brandmüller, *Ignaz v. Döllinger*, 62.

14 Jedin, *Kleine Konziliengeschichte*, 111–12, 125–6.

15 Heber, *Gutachten*; Haller, *Papsttum und Kirchenreform*; Scholz, *Publizistik*.

16 Heber, *Gutachten*, 75.

only for his 1896 dissertation on Durant and other reformers—though it may be worth mentioning as a curiosity that he is apparently identical to the Dr. Max Heber who published a new edition of Ernst Moritz Arndt's *Katechismus für den deutschen Kriegs- und Wehrmann, worin gelehrt wird, wie ein christlicher Wehrmann sein und mit Gott in den Streit gehen soll* that was printed in 1913 by the Society for the Distribution of Christian Writings in the Kingdom of Saxony in Dresden on the occasion of the anniversary of the wars of liberation.[17]

Heber devoted his dissertation to the memoranda on church reform that had been submitted to the Council of Vienne. He presented some new information about Durant's life that need not concern us further here, and he was the first to offer a somewhat detailed paraphrase of the countless suggestions to be found in the *Tractatus de modo generalis concilii celebrandi.*[18] In writing a paraphrase he established a tradition that would be followed by a number of other scholars[19] who, when confronted with what appeared to be the confusion pervading the *Tractatus*, found themselves obliged to refrain from looking for any governing principles in Durant's thought, paraphrased the detailed demands on the surface of the treatise instead, and then either pressed the details into a more or less systematic pattern that did little justice to the pattern adopted by Durant himself—like Heber, who used the various spiritual and temporal estates as his main principle of organization—or treated them one by one in the order in which they were printed, but without recognizing how they were related to each other, as did Viollet. In such paraphrases "fehlt leider! nur das geistige Band."[20] That goes some way towards explaining why, as we shall see below, Durant's work has been given thoroughly contradictory interpretations. Without knowing the structure and foundations of his project it is scarcely possible to avoid focusing more or less at random on one or another passage taken more or less out of context, which makes it correspondingly difficult to resist the temptation to over- or under-interpret such passages in favor of one or another kind of bias.

Heber was entirely right to draw attention to certain characteristic traits of the *Tractatus*, especially Durant's insistence on obedience to the ancient laws of the church (40n4, 72), the degree to which his demands were motivated by his interests as a bishop (46–7, 58), and his novel ideas about general councils (58, 72). Also worth noting is Heber's observation that Durant could have been influenced by Thomas Aquinas, even if his understanding of the relationship between pope and council seemed to lie roughly midway between Thomas and

17 Arndt, *Katechismus.*

18 Heber, *Gutachten*, 40–56, 64–74.

19 Especially Viollet, Posch, Lecler, and Vereecke.

20 Goethe, *Faust, Erster Teil*, Studierzimmer (2), line 1939.

William of Ockham (41n2, 73–4). Most telling for Heber's perspective on Durant, however, is his claim that Durant wanted to transform the pope into a constitutional sovereign, but lacked a well-articulated theory with which to support such a demand.[21] {209 | 210}

While denying that Durant's writing had any theoretical substance, Heber thus continued the radical interpretation of Durant's proposals that Döllinger had pioneered. To be fair to Heber it should be pointed out that he was also the first to acknowledge the main difficulty in the way of interpreting Durant's demands as radical. For if Durant had really been a revolutionary, it was hard to understand how he could have enjoyed such good rapport with the papacy prior to the Council of Vienne and engaged in diplomatic activities on a very high level for so many years throughout his career while maintaining relations with the papacy that were, if not always entirely harmonious, generally good (72–3). But that did not lead Heber to conclude, as it should have, that the category 'radically antipapal' was much too broad to capture the fine distinctions drawn by history. Instead he took refuge in the claim that Durant must have changed his attitude to the papacy and abandoned his radical views (72–3). That was a convenient solution to an interpretative embarrassment, but one for which there is no evidence.[22] Thus Heber's main accomplishment was to have made readers more familiar with a number of Durant's particular demands and to have characterized his place in history less by means of research than by well-turned phrases.

Johannes Haller (1865–1947), the Baltic German son of a minister from the island Dagö, deepened the interpretive groove carved by Heber.[23] Haller is of course a far more significant and better-known historian than Heber. Among his numerous writings, of which a very popular book on the epochs of German history deserves special mention, medievalists are particularly familiar with his idiosyncratic but path-breaking history of the papacy and his work as co-editor of the sources of the Council of Basel.[24] His book *Papsttum und*

21 Heber, *Gutachten*, 41n2: "Duranti will einen konstitutionellen Souverän haben." Ibid., 73: "Da er kein Theoretiker, sondern ein Mann der Praxis war, der keine systematische Abhandlung über die Verfassungsfragen der Kirche schreiben wollte, so begnügte er sich diese Forderung aufzustellen, das Ziel, zu dem man kommen musste und auch kam, anzugeben."

22 {Here I owe Heber an apology. The differences between the *Tractatus maior* and the *Tractatus minor* make it plain that, even if he did not change his mind, Durant did in fact abandon his radical proposals.}

23 On Haller's life see *Neue deutsche Biographie*, 7:552–3. See also Haller, *Lebenserinnerungen*.

24 Haller, *Epochen*; Haller, *Das Papsttum*; Haller, Beckmann, Wackernagel, et al., eds., *Concilium Basiliense*.

Kirchenreform of 1903, one of his earliest works, deserves particular mention here, not only because it dealt with Durant, but also because its portrayal of the movements of church reform from the high to the late Middle Ages has never been quite surpassed.[25]

Haller was an excellent writer who would hardly have found it useful to repeat Heber's paraphrases and limited his attention to a few particularly salient points instead. In his opinion, Durant's work was completely disorganized (60) and motivated by episcopal interests (62–3, 65). Admittedly {210 | 211} the radical demands of the bishop of Mende lacked any systematic justification,[26] which explained why his attitude towards the papacy was wavering (66). But what was truly important and influential about Durant's work was his desire to return to the law and the constitution of the ancient church—a desire that came to be characteristic of movements for church reform throughout the later Middle Ages (62, 64–5)—as well as his proposal to limit the power of the papacy in a manner that was intended to erase its entire development in the preceding century and would have turned the pope into a mere civil servant.[27]

This was evidently the same basic understanding of Durant that had been proposed by Heber and similar to Döllinger's views, even if it was put forth with greater élan. The most telling claims are once again that Durant was a radical, but was not able to justify his intentions with any theory worth mentioning.

For those reasons Haller's discovery of a new piece of evidence must be considered his most important contribution to the scholarship on Durant. Haller pointed out that in 1319 Pope John XXII had written two letters in which he cast light on the role Durant had played at the Council of Vienne (58–9). According

25 Haller, *Papsttum und Kirchenreform*, 58–66, 70.

26 Ibid., 65: "Alles dies zwar ohne systematische Grundlegung, bloss in einzelnen praktischen Forderungen formuliert, aber darum nicht weniger deutlich."

27 Ibid., 65: "Wer die Lage des Episkopats, vor allem des französischen und englischen, in jener Zeit kennt—und der französische war in Vienne am zahlreichsten vertreten—wie er, von den Landesherren in strenger Unterwürfigkeit gehalten, zum Teil aus Kreaturen des Hofes bestehend, seine einzige Zuflucht gegenüber fortwährenden Kränkungen, Vergewaltigungen und materiellen Bedrückungen im Papste sah, der wird über die Kühnheit einer Phantasie nur staunen können, die unter solchen Umständen nichts Geringeres als die Wiederherstellung einer ideal gedachten ursprünglichen Kirchenverfassung auf Grundlage des Episkopalismus und Konziliarismus zu predigen wagte und die gesamte Entwicklung, die das Papsttum seit mehr als einem Jahrhundert genommen, schlechtweg austilgen wollte, um das Oberhaupt der Kirche, das bisher des unangefochtenen Besitzes unbegrenzter Alleinherrschaft sich erfreut hatte, in eine von den Beschlüssen der ihm untergeordneten Organe abhängige Beamtenstellung herabzudrücken."

to those letters Durant had tried to foment rebellion among the bishops, aimed at creating a schism with the pope, and gave in only when the pope confronted him directly. Haller concluded that one could not very well treat the *Tractatus* as a mere memorandum on reform submitted to the Council of Vienne, and had to reckon with the possibility that the surviving version had been redacted (58–9).[28] These observations naturally lent further support to the interpretation of Durant as a radical—even if it has to be conceded that Durant's rebellion was not sufficiently grievous to prevent Clement V from dismissing Durant from the council with the usual favors, or to prevent the author of that supposedly schismatic book from continuing a successful career without any noticeable interruption.[29]

Last among the Protestant scholars to be considered here is Richard Scholz (1872–1942), the son of a merchant from Dresden. Scholz studied medieval {211 | 212} and modern history in Leipzig, where he was habilitated in 1902 and went on to teach medieval and modern history as extraordinary professor in 1908.[30] His studies and critical editions advanced the history of political thought in the early years of the fourteenth century by a considerable margin. His books on Giles of Rome and William of Ockham, his editions of writings by Giles of Rome and Marsiglio of Padua, and his study of previously unknown polemical writings at the time of Emperor Louis the Bavarian deserve special mention.[31]

Scholz's most important contribution to our subject is his account of the political debates conducted at the turn from the thirteenth to the fourteenth century, published in 1903.[32] Scholz not only presented the first comprehensive and still useful examination of the various treatises on political thought that were written in response to the conflict between Pope Boniface VIII and King Philip IV—the single greatest outburst of such writings since the Investiture Controversy—but also raised the scholarly treatment of Durant to a new level. This was in part because his review of Durant's manifold proposals was better organized than Heber's and Haller's (211–20). But it was more so

28 {That was a good guess. As the manuscripts confirm, Durant did in fact modify his proposals, albeit not by modifying the treatise he submitted to the Council of Vienne, but by writing a different memorandum while the council was in session; see above, chap. 2.}

29 We know this from E. Müller, *Vienne*, 593. Müller, ibid., 594–5, also proved that the treatise had undeniable effects on the legislation passed by the Council of Vienne.

30 Degener, ed., *Degeners Wer ist's?*, 1435.

31 Scholz, *Aegidius von Rom*; Scholz, *Wilhelm von Ockham*; Giles of Rome, *De ecclesiastica potestate*, ed. Scholz; Marsiglio of Padua, *Defensor pacis*, ed. Scholz; Scholz, ed., *Unbekannte kirchenpolitische Streitschriften*.

32 Scholz, *Publizistik*, here 208–23.

because he demonstrated that Durant, in spite of his treatise's apparent lack of organization, did in fact present a well-defined program of reform with a clearly discernible structure (209, 213, 220). According to Scholz the foundation of this program did not so much consist of the supposed rejection of the papal system that had been noticed before (209, 220–1), and that he did not want to overemphasize (209, 220–1), but rather of a very definite understanding of canon law that drew on the legislation of the councils of antiquity. That justified Durant's emphatic rejection of the new law embodied in papal decretals, for neither those decretals nor the system of papal government that had been built on them during the previous two hundred years agreed with the ancient law of the church (209, 221–2).

Scholz left it unclear what might have led Durant to develop such a theory, but he did point out that the most likely factors included Durant's intensive study of Gratian's *Decretum*, the most important twelfth-century collection of canon law, and probably even more so the revival of Aristotelian philosophy in the thirteenth century that had invigorated ideas about the limits that natural law imposed on every kind of monarchy, including that of the pope (221–2). The crucial factors behind Durant's theory of reform, to which Scholz was the first to pay proper attention, thus appeared to be Durant's reliance on ancient law and the emergence of new intellectual movements in the thirteenth century. {212 | 213}

Not content with this general characterization, Scholz also believed that the specific motives prompting Durant to formulate his theory of reform could be defined with greater precision. Going well beyond the generic references to Durant's episcopal motives that had been made before, Scholz declared that Durant's opposition to the centralizing tendencies of the papacy ought to be seen as the expression of an aristocratic reaction by the Gallican episcopate against the papacy.[33] Haller sharply rejected this idea in his review of Scholz's book.[34] He pointed out that a single treatise could hardly be considered proof that the bishop of Mende had acted as the representative of a whole party, particularly since Durant's pleas went entirely unheard by the Council of Vienne. But Haller's pointed rejoinder did not settle the matter. Durant did after all exercise demonstrable influence on the legislation of Vienne, and even though it is true that Scholz failed to demonstrate the existence of something that might be called a Gallican party, his thesis did point in a promising direc-

33 Ibid., 208: "Die aristokratische Reaktion des gallikanischen Episkopats." Ibid., 220: "Für Duranti [ist] das Ideal eine aristokratisch, vom Episkopat unter dem Vorsitz des Papstes, nach einer festen Verfassung geleitete Kirche, deren souveräne Autorität nicht im Papste, sondern im Generalkonzil liegt."

34 Haller, "Review of Scholz, *Publizistik*," 370–1.

tion of further research.[35] Gallicans like Pithou and Bossuet did quote Durant later on, and at least at first sight it seems entirely convincing to view his propositions as a response on the part of the French bishops to the pressure under which they found themselves at the hands of what they may well have regarded as unholy alliances uniting the king of France with the pope and even more so the pope with the mendicant orders. That agrees well with the emphasis Durant placed on the hierarchical structure of the church, for it was precisely this structure that was slowly being dismantled from above as well as from below, and whose strict preservation had to seem reactionary to mendicant friars depending for their success on the special privileges they were being granted by the pope.

Of more substantive interest than Scholz's speculations about a Gallican aristocratic reaction against the papacy is what he had to say about the content of the theory Durant presented in the *Tractatus de modo generalis concilii celebrandi*. Here one must object that his interpretation went too far in the direction of seeing Durant as a radical. To mention a telling example, one may well agree with Scholz when he declares that Durant attributed the establishment of papal primacy to historical causes, including above all the support given to the papacy by the councils of antiquity (221). For Durant did in fact write: "Since it was, first, the merit of the apostle Peter and, second, the authority of venerable councils securely confirmed by the command of the Lord that transferred a singular authority over the churches to the pope . . . ."[36] But the derivation of papal primacy from ancient conciliar authority apparently asserted in those words takes on a rather different meaning as soon as one realizes that they were quoted from Gratian's *Decretum*.[37] If they established a new historical perspective on the papacy at all, they surely did not do so only for the bishop of Mende, but had already done so for Gratian himself.

Scholz moved still further in a misleading direction when he claimed that Durant endowed the council with sovereignty over the church (220). Imposing the modern concept of {213 | 214} sovereignty on the interpretation of the *Tractatus* was to do damage to historical understanding. The concept of sovereignty may well bear a genuine historical relationship to the issues at stake, but it is not well suited to disentangling them. Regardless of how one interprets Durant's ideas, it has to be stressed that his position on the relationship between pope and council was not entirely clear. Nowhere did he answer the

35 Cf. above, n. 29, and below, chap. 6.

36 Durant, *Tractatus*, 3.1, fol. 52r: "Cum [papae] sedi primum Petri apostoli meritum, deinde secura iussione Domini conciliorum venerandorum autoritas singularem in ecclesiis tradiderit potestatem . . . ."

37 D. 17 d. p. c. 6, *Corpus iuris canonici*, ed. Friedberg, 1:52.

question of who was to make the final decision in the event that pope and council disagreed. Indeed, he never even posed the question—something he could hardly have done without endangering his success since doing so, as he must have known only too well, would have confronted him with tensions deeply embedded in the foundations of canon law itself. Those same tensions after all still form the subject of disagreements in contemporary debates about the significance of the First and Second Vatican Councils. For those reasons alone it seems misguided to search Durant's *Tractatus* for a definition of ecclesiastical sovereignty. Scholz's claim that Durant endowed councils with sovereignty over the church may therefore be described as a conclusion supported chiefly by Scholz's reliance on an inappropriate terminology.

Again, it is simply not true that Durant included conciliar decisions in the category of divine law[38]—even if at a decisive turn he did try to create the impression that they were.[39] Finally, one must insist on a crucial distinction: Durant made a proposal that, had it been enacted, would indeed have subjected the pope to the council, even if it remains to be determined precisely what that subjection would have amounted to. But it was only a proposal; it was not (yet) law. The bishop of Mende knew perfectly well that according to existing canon law there was no way to prevent the pope from departing even from the decisions of ancient councils, notwithstanding that such conduct was not to be approved.

The results of Scholz's study may thus be summed up as follows. He provided an analysis of the *Tractatus* that remains in some ways fundamental, both because it drew attention to the theory supporting Durant's demands and because Scholz was the first to stress the significance of law for that theory. He also deserves real credit for having underlined the coherence of Durant's program of reform. At the same time his interpretation went too far down the path

38 Scholz, *Publizistik*, 222: "[Er rechnet] die Konzilsbeschlüsse, weil sie vom heiligen Geist inspiriert sind, zum göttlichen Rechte, während die ohne Konzil erlassenen päpstlichen Dekretalen nur zu den menschlichen Satzungen gehören, die unter Umständen widerrufen werden können." Ibid., 223: "Duranti . . . erklärt, dass dem Papste weder gegen (contra ea) noch über das (super his), was die Apostel und Konzilsväter bestimmten, ein Gesetzgebungsrecht zustehe."

39 For he says in *Tractatus*, 1.3, fol. 5^{r}: "Et si dictatur quod [papa et reges] legibus sunt soluti, potest responderi quod non divinis," and then quotes papal canons that underline the authority of conciliar decisions. But that is misleading. For elsewhere he says explicitly: "Humanum genus duobus . . . salubriter potest regi: videlicet naturali iure contento in lege et evangelio, et moribus, hoc est humanis legibus sancti spiritus instinctu in canonibus apostolorum, conciliis et a romanis pontificibus et a catholicis principibus prelatis pro communi utilitate." Durant, *Tractatus*, 3.31, fol. 61^{v}. Cf. D. 1 d. a. c. 1, *Corpus iuris canonici*, ed. Friedberg, 1:1.

towards the radical interpretation of Durant's *Tractatus* that Döllinger had been the first to put forth.

Overall we may conclude that Protestant scholars managed to steer the interpretation of Durant's *Tractatus* in a direction that is still basic to our understanding of its significance. Even where {214 | 215} the Protestant insistence on Durant's supposed radicalism is now being rejected, scholars still work with similarly generic categories of analysis, which can lead them to offer interpretations directly opposite to those offered by Protestants, but not necessarily more appropriate. The earliest studies of Durant were beset by a basic flaw that continues to burden scholarship today, namely, to claim that Durant's position was 'anti-papal,' and then to examine his position only as far as can be done without imperiling this crude categorization. Admittedly the style and genre of the *Tractatus* do not exactly make it easy to work out the principles by which Durant was animated. Nonetheless the authors treated so far seem to have made it too easy for themselves. One may suspect that, at least in part, they did so because they felt uneasy with the results to be expected from a more searching analysis. If they had tried to carry out such an analysis in the crude terms just mentioned, Durant's statements in support of papal primacy—statements at which they merely hinted—would so obviously have had to be characterized as 'pro-papal' as to make any 'anti-papal' interpretation untenable. It seems only logical that Catholic scholars often reacted by making equally one-sided exploitations of Durant's 'pro-papal' statements the starting point of their research.

2 Catholic Responses until World War II

Catholic research on Durant's *Tractatus de modo generalis concilii celebrandi* did not resume until the third decade of the twentieth century, fifty years after Döllinger's defeat, after the end of World War I, and, what may well be more important here, after the conclusion of the modernism crisis, in which a new Catholic movement that can only in a broad sense be characterized as 'liberal' had once again been put in its place by the papacy.

The first scholar to be mentioned here is Paul Viollet (1840–1914), who hailed from a family of silk manufacturers in Tours.[40] His name is firmly associated with the history of French public and private law as well as his teaching as

40 Delaborde, "Notice," 148, and especially Fournier, "Paul Viollet" (1914), and Fournier, "Notice sur Paul Viollet" (1921).

professor of law at the École des Chartes.[41] Since his work had made him thoroughly familiar with medieval canonists, it was only natural that, among a number of other contributions to the monumental *Histoire littéraire de la France*, he also wrote a biography of William Durant the Younger and an overview of his surviving writings that was published in 1921.[42] {215 | 216}

Though Durant's life is not the subject under consideration here, it is worth stressing that Viollet's biography has never been surpassed. He was the first to draw at least on excerpts from documents buried in the archives that cast new light on Durant's exercise of his official responsibilities as bishop in the diocese of Mende, and the first to establish with certainty that he died in July 1330 (60–1). Yet even though his biography remains the best, it is by no means definitive. A thorough account of the life of William Durant the Younger remains to be written.[43]

Viollet's description of the *Tractatus* raised the state of scholarship to a new level, not only because he prepared what is still the most thorough paraphrase of its contents (82–117), but also because he identified five of the ten manuscripts now known.[44] That was a major accomplishment, never mind that Viollet failed to recognize the significance of the differences between the manuscripts and the early modern printed editions that were available to him (82n1). It was similarly important that he was able to document instances in which Durant seems to have influenced Pierre d'Ailly, Jean Gerson, Nicholas of Cusa, Pierre Pithou, and the great Gallican Bossuet (123–9). Though his observations on the influence of Durant's ideas are brief, they have not been improved upon except by Ewald Müller's research on Durant's impact on the legislation of the Council of Vienne and Ernesto Bellones brief study of his proposals on the reform of education.[45]

With a single telling exception Viollet refrained almost entirely from offering an interpretation of Durant's theory of reform. The exception was to demonstrate, in direct opposition to Scholz, that one may not take the *Tractatus* to have been advocating the pope's unconditional subjection to existing conciliar laws (118–19). To the contrary, in Viollet's opinion Durant had merely charged the pope with abusing the power of his office by going against the demands of justice—something entirely different from denying that the pope had any

41 Viollet, ed., *Établissements de Saint Louis*; Viollet, *Droit public*; Viollet, *Droit privé*.

42 Viollet, "Guillaume Durant," written before 1914, but not published until 1921.

43 {My *Council and Hierarchy* goes only part of the way towards a biography.}

44 Paris, Bibliothèque Nationale, ms. lat. 1443; Paris, Bibliothèque Mazarine, ms. 1687; Troyes, Bibliothèque Municipale, ms. 786; Tours, Bibliothèque Municipale, ms. 237; Kues, St. Nikolaus Hospital, ms. 168. Cf. Viollet, "Guillaume Durant," 79n2.

45 Both will be mentioned below.

such power to begin with.[46] Thus Viollet launched the Catholic critique of too far-reaching Protestant interpretations.

Given Viollet's considerable restraint on questions of theory, it is not really possible to gain a clear perspective on his judgment of the *Tractatus*. But it is striking that every now and then, in a study otherwise based entirely on meticulously documented research, there is a touch of open hostility.[47] Why the sarcasm? Why the repeated traces of a desire to charge Durant with intellectual and moral dishonesty? {216 | 217} We have no answer to these questions. But a possible answer may be suggested by an incident of some historical interest in Viollet's life.

Viollet, a scholar of scrupulous intelligence as well as a devout Catholic, made a point of standing up for his convictions by serving as president of the Catholic Committee for the Defense of the Law that he founded in the opening years of the twentieth century in order to help reverse the conviction of Dreyfus.[48] The effect was to make him an ally of men like Emile Zola and Georges Clémenceau on the left wing of the French political spectrum. That hardly endeared him to French Catholics, most of whom objected to support for Dreyfus. The same applies to the uncomfortable position in which he placed himself at the beginning of the modernism crisis by writing a historical and theological study of papal infallibility and Pope Pius IX's Syllabus of Errors.[49] His book was dedicated "aux chrétiens que des notions inexactes sur la papauté retiennent en dehors du Catholicisme." He was evidently struggling to close the deep divide between intellectuals and Catholics precisely at the time when the breach between the French state and the church was coming to a head. With the help of a very moderate interpretation of the Syllabus of

46 Viollet, "Guillaume Durant," 119: "Certes il voudrait, en effet, que le pape ne se mît jamais en opposition avec un concile général sans le concours d'un autre concile, et même qu'il réunît un concile chaque fois que l'intérêt de toute l'Église est en jeu. Mais nous ne voyons pas qu'il nie l'existence des pouvoirs du souverain pontife; mésuser de ses pouvoirs et manquer absolument de pouvoirs sont deux choses différentes."

47 Ibid., 39: "Quant a l'auteur du *De modo celebrandi concilii*, ce pur chrétien des premiers siècles et des grands conciles œcuméniques, il oublie trop facilement certains préceptes de morale chrétienne et même de morale naturelle." Ibid., 86, Viollet charges the bishop of Mende with having forged one of his sources. But if one compares the passage he cites as evidence of forgery with its source in canon law, the charge turns out to be entirely unjustified. Ibid., 80: "Il a pris ou fait prendre quantité de notes. Il les utilise et les commente, sans les avoir au préalable convenablement classées par matières, et sans apporter toujours à l'étude des textes un sens critique parfaitement équilibré." Cf. also ibid., 82, 99–100, 110.

48 Weill, *Histoire du catholicisme libéral*, 226–7.

49 Viollet, *Infaillibilité du pape*.

Errors and the declaration of papal infallibility of 1870 he hoped to convince anticlericals that it was not at all necessary for the state to suppress the Catholic Church, and Catholics that their retreat to extreme ultramontane and monarchical positions rested on an equally unjustified understanding of the documents in questions. With those views he landed squarely between the chairs. On 4 April 1906, in one of the very first measures taken by the papacy during the modernism crisis, Viollet's book was placed on the index.[50] That must have affected him deeply. It leaves room for the suggestion that his attacks on Durant may be taken as evidence for the bitterness of a man whose best intentions had been defeated, and who may well have regarded the bishop of Mende as belonging to the very same type of self-righteous critics of the papacy with whom it had been his misfortune to enter into battle.

Jean Rivière (1878–1946), the son of a farmer from the Département Tarn in the South of France, studied theology at the Institut Catholique in Toulouse, received a doctorate in theology, and was appointed professor at the University of Strasbourg in 1919.[51] Having been ordained to the priesthood in 1901 and later on in his career named honorary canon {217 | 218} in Albi (1931) and Strasbourg (1937), his life's work was devoted to the doctrine of redemption. In a series of authoritative books appearing since 1905 he investigated the Christian understanding of redemption from the beginnings to the present.[52] His basic intellectual perspective may be characterized by quoting the judgment he pronounced in his authoritative history of modernism in the Catholic Church, published in 1929:

> Even while calling themselves Catholic . . . the modernists were clearly no longer Catholic in spirit. . . . In so far as it is possible to define modernism in general, it was a crisis provoked by the encounter of Christianity with modern science.[53]

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50 Delaborde, "Notice," 169; Rivière, *Modernisme*, 329–30.

51 Lombard, ed., *Jean Rivière*, 23–7.

52 Rivière, *Dogme: essai historique* (1905); Rivière, *Dogme: étude théologique* (1914); Rivière, *Dogme chez saint Augustin* (1928); Rivière, *Dogme après saint Augustin* (1930); Rivière, *Dogme: études critiques* (1931); Rivière, *Dogme au début du moyen âge* (1934); Rivière, *Dogme contemporaine* (1948).

53 "Tout en se disant catholiques, . . . il est clair que les modernistes ne l'étaient plus d'esprit. . . . Pour autant qu'on puisse, en effet, lui trouver une idée générale, le modernisme fut une crise provoquée par le contact du christianisme avec la science moderne." Rivière, *Modernisme*, 551, 554.

While those words testify to Rivière's faith as a Catholic, it should be underlined that they also speak to his qualities as a good historian. The same is true of *Le problème de l'église et de l'état au temps de Philippe le Bel*, the book he published in 1926 that is to be considered here.[54] There is no more balanced account of Durant's plan for the reform of the church than the one Rivière gave there on barely seven pages.

Abstaining entirely from paraphrase, Rivière began by observing that Durant's progressive views on matters within the ecclesiastical sphere were complemented by a conservative insistence on the superiority of the church over the state that was just as clearly expressed, and that he explicitly drew favorable attention to the views of Giles of Rome, the best known curial theoretician of the day, who wrote in good Gregorian fashion (364–5). That alone was enough to put Durant's supposed radicalism in a quite different light. According to Rivière the core of Durant's proposals for the reform of the church was to be found in his defense of the hierarchy and his corresponding attack, not on the papacy as such, but on the absolute power of the papacy. Its substance was Gallican (365–6, 368). Its theoretical foundation consisted of the ancient law of the church, its opposition to absolute papal power, the role of reason, and every monarch's need for good advisers.[55] On that foundation, and not on the basis of any kind of anti-papalism, Durant had sought to erect a kind of parliamentary system, {218 | 219} but without giving general councils the highest authority in the church, a point on which Durant differed from later conciliarists (367–8).

With these brief but convincing remarks Rivière managed to give an unsurpassed characterization of Durant's ideas insofar as those ideas can be characterized in general terms at all. His accomplishment consisted less of new insights than of his thorough integration of material that was already known. Particularly worth remembering is the attention he paid to the connection between law, reason, and council, which deserves to play a large role in any

54 Rivière, *Problème de l'église*, esp. 363–9.

55 Ibid., 366: "A la base et au sommet de la réforme nécessaire il veut placer le droit. Par où il entend d'abord cette loi abstraite du bien qui s'impose à tous les pouvoirs, *regenda igitur atque limitanda et restringenda est sub ratione potestas ut totum ratio regat*, mais aussi les prescriptions du droit écrit." Cited from Durant, *Tractatus*, 1.3, fol. 5^{v}. Ibid., 367: "Mais il n'est droit si parfait qui n'ait besoin d'une autorité vivante pour l'appliquer ou le contrôler. '*Ibi salus ubi consilia multa*': Guillaume appuie sur cette parole de l'Écriture tout un système parlementaire." Cited from Durant, *Tractatus*, 1.4, fol. 7^{r}. Here I should already point out how fundamentally this interpretation differs from the one by Brian Tierney, who considers Durant's theoretical foundation to have consisted of the canon law of political corporations.

interpretation of the *Tractatus*. One can only regret that he had only seven pages to devote to Durant.

Compared to the results established by Viollet and Rivière, the article published in 1929 by Andreas Posch (1888–1971), professor of ecclesiastical history in Graz, is less successful.[56] Having studied at the universities of Graz and Vienna, Posch received doctorates in philosophy and theology.[57] He is best known for two books devoted, respectively, to Nicholas of Cusa's *Concordantia Catholica* and Engelbert of Admont.[58] His observations about the *Tractatus* can be viewed as an attempt to mitigate the theses put forth by Scholz and to place them in a different historical perspective. That did not really yield new insights—not to mention that Posch seems to have been unaware of the studies published by Viollet and Rivière.[59]

On Posch's understanding, Durant's treatise ought first and foremost to be taken as an attempt to reform the church, not as a work of conciliar theory (289). Posch granted that Durant clearly identified the damage done by papal centralization (288, 291), and that he demanded a return to the old law of the church for reasons evidently including his episcopal interests (296–7). It was also true that Durant supported his endeavor with Aristotelian ideas about natural law (291) and wanted to give general councils a new role in the constitution of the church (303). But he did not go nearly as far as the conciliarists William of Ockham and Marsiglio of Padua (290–1, 295, 298). On balance, Durant's frank acknowledgment of papal primacy rather put him at a considerable distance from later conciliarists (290). He did not ask for anything like popular sovereignty, as Marsiglio did later on. Indeed, according to Posch he did not have any well-developed conciliar theory at all (295, 303). {219 | 220} His central point was simply that papal power needed to place limits on itself (293). It followed that Durant did not qualify as more than, at best, a precursor of conciliarism.[60]

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56 Posch, "Reformvorschläge."

57 Kosch, *Das Katholische Deutschland*, 2:3658.

58 Posch, *Concordantia Catholica*; Posch, *Staats- und kirchenpolitische Stellung*. In *Concordantia Catholica*, 38–9, Posch treats Durant again, but does not add anything beyond what he had written in his article.

59 Posch, "Reformvorschläge," cites neither Viollet nor Rivière, and ibid., 289n2, he still identifies the year of Durant's death as 1328, which Heber, *Gutachten*, 71, had already rejected, and which Viollet, "Guillaume Durant," 60–1, had given compelling reasons to replace with 1330.

60 Posch, "Reformvorschläge," 303: "Fehlt bei ihm auch die gründliche Fundierung seines Standpunktes, wie sie Marsilius und Okam, ausgehend von naturrechtlichen Postulaten, später boten, erscheint der Konzilsgedanke bei ihm auch keineswegs in seine letzten

It seems that Posch was concerned to revise Protestant interpretations of a subject that he was the first German-speaking scholar to address since Scholz in 1903. His study has the merit of relating Durant's work to the development of conciliarism as a whole. At the same time it must be pointed out that more recent scholarship has made his identification of conciliarism with the theories of William of Ockham and Marsiglio of Padua untenable. That leaves his decision to exclude Durant from the history of conciliarism on the grounds that he did not share the views of Ockham and Marsiglio rather less convincing than it might have seemed at the time.

The book about the Council of Vienne that Ewald Müller, O.F.M. (1885–1960) published in 1934 similarly continued the Catholic trend towards viewing Durant as something of a moderate reformer.[61] Müller, having earned doctorates in philosophy and theology, like Posch, went on to serve on the faculty of philosophy and theology at the Franciscan College of Frauenberg in the province of Thuringia.[62] His book—the only one he wrote—is an outstandingly thorough piece of research that improved our understanding of Durant's influence on the legislation of Vienne by leaps and bounds. It is Müller to whom we owe a conclusive refutation of Haller's opinion that Durant did not exercise any influence on the Council of Vienne at all (594–5; for details see 475n1, 490, 539–40, 548–9, 570–1, 574, 591). Müller did not have much to say about Durant's theory, however, and the little he did say lacks some coherence. For, on the one hand, he appears to evoke the radical version of Durant by associating him with "episcopalism," "conciliarism," and "constitutional monarchy."[63] But on the other hand he wrote that Durant treated the pope with "almost childlike awe."[64]

Pierre Torquebiau, S.P. a S.S., a Sulpician priest, member of the Académie de Législation de Toulouse, and professor of canon law at the Institut Catholique

Konsequenzen ausgebaut, so ist er doch der erste, der das Konzil als ständige Einrichtung, als konstitutionellen Faktor in der Kirche fordert und demselben die Legislative überweist. Ohne ein fertiges System des Konziliarismus zu liefern, hat er doch viele Gedanken desselben vorausgenommen."

61 E. Müller, *Vienne*, 587–8, 591–610.

62 *Kürschners Deutscher Gelehrten-Kalender 1935*, 935.

63 E. Müller, *Vienne*, 596: "Diese bereits nach der konziliaristischen Seite hinüberneigenden Ideen führt Duranti weiter aus, indem er für die Regierung der Welt den Gedanken einer konstitutionellen Monarchie . . . vorschlägt." Ibid., 608: "Charakteristisch für die Zeit des beginnenden Episkopalismus und Konziliarismus sind manche Ideen Durantis von einer gemässigten Demokratie in der kirchlichen Regierung."

64 Ibid., 593n27: "Duranti hat aber an anderer Stelle wieder ganz klar den Primat bekannt." Ibid., 593n30: "Vgl. die durchaus korrekte Art, ja kindliche Ehrfurcht in seinen Ausdrücken über die römische Kirche."

in Toulouse in 1935–36 and 1945–46, published a study in 1936 that may be described as moving the Catholic reevaluation {220 | 221} of Durant's intentions in an almost reactionary direction.[65] Torquebiau thought it was inconceivable for the nephew of the famous William Durant the Elder, known by his honorific sobriquet as the Speculator, with whom William Durant the Younger was continually confused, to have been an opponent of the papacy, much less a Gallican, as even Rivière still had maintained.[66] The bishop of Mende rather needed to be viewed as a young prelate who insisted all too eagerly on his rights, but would not have dreamed of rebelling against the papacy.[67] Even among long-lived clerics the plain fact that Durant was well over forty years old when the Council of Vienne was meeting surely diminishes the plausibility of the complaint that he was acting from youthful exuberance at least to some degree. A substantive critique of Torquebiau's interpretation must nonetheless take up his well-founded arguments about Durant's theory of law.

Torquebiau picked up a train of thought from Viollet that Viollet himself had not pursued any further. Could Durant possibly have claimed that the papacy was firmly bound to obey conciliar laws? Torquebiau sought to answer this question with a close analysis of passages mostly taken from Durant's chapter on exemptions (274, 275–7, 281–2). He arrived at the conclusion that Durant did indeed believe the pope might perhaps be bound to obey such conciliar laws—but only "perhaps" (281–2)! No matter how carefully one looked for other formulations, Durant never went further than that, and he most certainly never asserted that the council enjoyed authority over the pope (278–9). Conciliar laws themselves were mutable after all (277). What had been presumed to be his conciliar theory thus turned out to have nothing to do with

65 Torquebiau, "Gallicanisme." There does not appear to be any widely accessible source of information on Torquebiau's life. {I am grateful to Henri Lample, Institut Catholique de Toulouse, for a few new details.}

66 Torquebiau, "Gallicanisme," 289: "Le neveu et successeur sur le siège de Mende de Guillaume Durand, dit le *Speculator*, qui saluait le Pape des titres les plus magnifiques, reconnaissait en lui le dépositaire de tous les pouvoirs religieux dans l'Eglise du Christ et la source du pouvoir de tous les prélats inférieurs, ne pouvait être, ne fut pas un ennemi déclaré du système papal ni un gallican qui s'ignore." That is directed against Rivière, *Problème de l'église*, 368.

67 Torquebiau, "Gallicanisme," 273: "Mais si l'on oberve les nuances parfois très délicates de la pensée de l'auteur, si l'on considère avec soin l'ensemble du traité, si l'on tient compte du tempérament de ce jeune prélat, Guillaume Durand apparait, non comme un théoricien soucieux de faire prévaloir une organisation toute nouvelle de l'Eglise dans laquelle les pouvoirs du Pontife romain se trouveraient singulièrement réduits et ceux des évêques recevraient une extension inattendue, . . . mais comme un prélat qui est jaloux à l'excès des prérogatives réelles ou supposées de sa charge."

constitutional limitations upon the papacy because it never went beyond the limits of that "perhaps" (279–80). Torquebiau joined this new insight to remarks about Durant's episcopal motives (282–6) and his recognition of papal primacy (284, 286–7) that are familiar from previous research. In his view this evidence proved conclusively that Durant was no opponent of the papacy.[68]

It must be stressed that Torquebiau's investigation into Durant's understanding of existing canon law amounted to a significant advance. He was the first to make it perfectly clear that the central problems for the cohesion of Durant's ideas consisted of the mutability of human law, {221 | 222} including laws enacted by general councils, and the legislative power of the papacy. He was also entirely right to point out that Durant did no more than "perhaps" to deny the pope's right to issue exemptions and dispensations in conflict with ancient conciliar laws.[69] Yet the significance of these results does not reach nearly as far as Torquebiau made his readers believe.

For, in the first place, it may be granted that Durant dealt extensively with the problem of exemptions, and that exemptions constitute one of the focal points of his proposals for reform. That is also the reason why his discussion of exemptions includes the clearest statement of his views about the nature of the ecclesiastical hierarchy and the place of bishops in that hierarchy. But his treatment of exemptions is by no means central to the political theory to which the first part of the *Tractatus de modo generalis concilii celebrandi* is primarily devoted. It may be long, but it constitutes only one 'rubric' among several, and it follows the concluding fourth chapter of the first part: it is, in other words, an appendix. The appendix is important, but it is an appendix nonetheless. The substance of the theoretical considerations supporting Durant's spectacular demand to make the validity of papal legislation dependent on the participation of general councils is found in chapters two and three, preceding the presentation of that demand itself in chapter four.

In the second place, Torquebiau took as little trouble to distinguish Durant's proposals for legislative reform from his description of existing legislation as Scholz had done before, except that he did so for the opposite purpose, namely, to make Durant seem less radical than he was. Durant was an exceptionally

68 See above, n. 66.

69 Durant, *Tractatus*, 1.4, fol. 8^{v}: "Unde cum dominus papa tantam et talem observationem <mutare> [P] non debeat, nec forte valeat, ergo nec generales exemptiones, privilegia, libertates, et immunitates derogativas et preiudicativas honori, potestati, statui, ordinationi, et ordini dictorum episcoporum et ordinariorum contra predictam generalem ordinationem sic passim concedere non debet, nec etiam forsitan valet." The variant *mutare*, instead of *imitari* as in the printed edition, is taken from Paris, Bibliothèque Nationale, ms. lat. 1443, fol. 8^{v}.

well-educated canonist who obviously knew perfectly well what the pope was, and what he was not, authorized to do by canon law. Yet that did not prevent him from criticizing the extent of the pope's authority or from proposing limits on its extent. His proposal was that in the future the pope should no longer be permitted to pass new laws or change old laws without convoking a general council.[70]

What matters here is neither that Durant failed to demand a conciliar right of veto against papal measures nor that he never used the formulation *concilium maius papa*. What matters is that he intended to limit the pope's right to change existing laws by requiring him to consult a general council. It will not do to base one's judgment of Durant's intentions solely on his analysis of existing law, for existing law was precisely what he wanted to change. One rather has to recognize that, if Durant's proposal {222 | 223} had been accepted, the pope would no longer have been able to pass any legislation without the participation of a general council—and in that case he would, not "perhaps," but simply and unequivocally not have been able to do so.

Even if these reflections leave a good number of questions undecided, they should suffice to diminish the credibility of Torquebiau's conclusions. Torquebiau may be called a perfect counterpart to Scholz. As Scholz arrived at too radical an interpretation of Durant by insisting one-sidedly on his novel proposals, so Torquebiau arrived at too moderate an interpretation by insisting one-sidedly on his understanding of existing law. Neither interpretation does justice to the *Tractatus* as a whole: both are based on a selection of passages chosen to support a particular point of view. What Torquebiau did accomplish was to have provided the first convincing identification of the crucial interpretative difficulties.

3 Catholic Studies since World War II

With Torquebiau we have, so to speak, exhausted the whole spectrum of interpretations that can be founded on black-and-white views of the *Tractatus de modo generalis concilii celebrandi*. In describing that spectrum I hope to have shown that there was a relatively unilinear development in the scholarship leading from Döllinger and Protestant writers around the turn of the century,

70 Durant, *Tractatus*, 1.4, fol. 7^{r}: "Videretur esse salubre consilium . . . quod [papa et reges ac principes] contra dicta concilia et iura nihil possent de novo statuere vel concedere [!] nisi generali concilio convocato." Note the conjunctive in *videretur* and *possent*, the absence of *forsitan*, and the reading *concedere*, which is supported both by the manuscripts and by the editio princeps.

via a leading Catholic intellectual like Viollet to members of Catholic orders like Müller and Torquebiau in the 1930s, and that in the course of this development Durant gradually changed shape from a radical enemy of the papacy into, at worst, a somewhat intemperate friend of the papacy. None of the studies considered so far can be considered definitive and the same is true of the new departures made since World War II that are to be considered next.

In 1949 Hubert Jedin (1900–80), perhaps the most important church historian of the twentieth century, wrote a few sentences drawing attention to Durant at the beginning of the comprehensive and compelling review of conciliar theories in the thirteenth and fourteenth century he published in the first volume of his *Geschichte des Konzils von Trient*.[71] That doubtless helped to stimulate new research. Jedin stressed Durant's call for a reform of the head of the church, a return to the old law, and a restoration of episcopal power, but he did not believe that Durant could have been thinking of constitutional limits on papal power.[72] {223 | 224}

In 1955 the ball was picked up by Brian Tierney (born 1922), who devoted ten pages of his path-breaking book on the *Foundations of the Conciliar Theory* to William Durant the Younger.[73] Tierney's theses are well known. He established once and for all that one ought not to trace the origins of conciliarism to Ockham or Marsiglio. In his view, the conciliar theory was nothing like a deviation from the straight and narrow path of the Catholic Church, but thoroughly Catholic and built directly on the thought of the most highly respected canonists of the thirteenth and fourteenth centuries. Particularly important in that thought was the canonists' analysis of the relationship between the head and the members of a body politic, as for example a bishop and the members of his chapter, the case to which they devoted most of their attention.[74]

71 Jedin, *Geschichte*, 1:5–7. In addition to his monumental *Geschichte des Konzils von Trient*, Jedin's most important writings worth mentioning here are the widely read *Kleine Konziliengeschichte*, the *Atlas zur Kirchengeschichte* he co-edited, and the indispensable *Handbuch der Kirchengeschichte*. On his life and work see Iserloh and Repgen, eds., *Reformata reformanda*, particularly Samulski, "Bibliographie Hubert Jedin," ibid., 2:665–704, and Brandmüller and Bäumer, eds., *Festgabe Hubert Jedin*, particularly Bäumer, "Hubert Jedin." {See now Jedin, *Lebensbericht*.}

72 Jedin, *Geschichte*, 1:5: "Für Duranti besteht die 'Reform des Hauptes' im richtigen Gebrauch der päpstlichen Gewalt; an eine konstitutionelle Beschränkung derselben denkt er nicht."

73 Tierney, *Foundations*, 179–82, 190–9. A convenient collection of many of Tierney's articles was recently published by Variorum Reprints as Tierney, *Church Law and Constitutional Thought*.

74 Tierney, *Foundations*, 245: "The roots of the conciliar tradition lie deeper in the past than has usually been supposed. . . . The Conciliar Theory, one might say, sprang from the impregnation of Decretist ecclesiology by Decretalist corporations concepts."

There is no need to go more deeply into Tierney's theses here, other than perhaps to characterize them as the expression of a revival of Catholic liberalism with new arguments. What does need to be pointed out is that they form the frame of reference for his interpretation of Durant. Unlike his immediate predecessors, Tierney pointedly asserted that Durant was the first to use the language of the conciliar movement properly speaking.[75] He based this assertion not so much on Durant's sharp attacks on papal centralization, which he took to be clear evidence for a kind of episcopal resistance motivated by the interests of a whole estate, and surely in Durant's self-interest, too,[76] but rather on Durant's claims "that a Pope alone could not override the legislation of previous Councils," and "that no Pope could establish a new law contrary to the canons of earlier Councils without summoning a new Council for the purpose."[77] In Tierney's judgment Durant "seems to have overstepped the bounds of Decretist thought in thus applying the *Quod omnes tangit* principle to the general legislative authority of the Papacy, for Joannes Teutonicus had maintained in a quite contrary sense that to deny the Roman See's right of establishing law for the whole church was heresy."[78] Durant's proposal {224 | 225} to give the council not only a constitutional role in the church, but also a kind of budgetary control over the finances of the papacy pointed in the same radical direction.[79] Typical for Durant thus was "the blending of a hierarchical

75 Ibid., 196: "Indeed, this sprawling ill-designed work . . . strikes for the first time the authentic note of the Conciliar Movement properly so called."

76 Ibid., 192: "The main purpose of Guilielmus Durantis in arguing thus that the Pope was not entirely *legibus solutus* was to justify the traditional rights of the bishops." Ibid., 182: "Like Joannes Monachus, Durantis was perhaps not wholly uninfluenced by personal considerations in his denunciations of ecclesiastical abuses. . . . But he too, by identifying his grievances with those of a whole estate of the Church, was able to infuse a glow of righteous indignation into his condemnations of papal centralization. . . . Durantis . . . condemned the whole system of centralized administration." These sentences are reminiscent of the views of Scholz.

77 Ibid., 195, 191.

78 Ibid., 195, with reference to Joannes Teutonicus's gloss on D. 19 c. 5 and VI *De regulis iuris* c. 29, *Corpus iuris canonici*, ed. Friedberg, 1:61, 2:1122.

79 Tierney, *Foundations*, 195–6: "The Council was not to be an extraordinary assembly summoned at rare intervals for some special purpose but was to meet regularly every ten years; and, moreover, the provision of revenue sufficient for the honourable upkeep of the curia was to be dependent on its observance of the laws of the Councils. . . . Durantis . . . wished to assign to the Council a regular constitutional role in the government of the Church, to make it the necessary channel for taxation and all important legislation." With reference to Durant, *Tractatus*, 2.27, fol. 59^{r}.

view of the Church with a corporative view."[80] He disputed that episcopal jurisdiction was derived from the papacy.[81] According to Tierney Durant's significance overall rested on the foresight with which he expressed the interests of the episcopal estate as a whole, as opposed to those of individual bishops, and highlighted the conflict between papal centralization and ancient canon law. "His work provides an interesting link between the current theories of episcopal authority and later conciliar doctrine."[82]

It is interesting that here Durant is again interpreted as a radical, in a manner reminiscent of Scholz. The attention Tierney paid to the role of the canon law of corporations is of course entirely new, and his interpretation of Durant has not yet found a substantial response. Nonetheless the following points are still worth making. As Torquebiau demonstrated so triumphantly, Durant never directly denied the right of the pope to act counter to conciliar laws. He limited himself to stating that the pope ought not to do so, and that "perhaps" he could not do so either. Thus Tierney's observation that Durant may have committed heresy in making the papacy's right to establish general laws dependent on conciliar participation needs to be corrected. It cannot be stressed firmly enough that this was not Durant's account of existing law, but a proposal to change existing law that he put in the subjunctive mood and submitted to the Council of Vienne for deliberation—and we may add that he did so precisely in order to allow a general council to determine his proposal's utility and conformity with Catholic doctrine. In addition it should at least be mentioned how sharply Tierney's interpretation differs from that of Rivière. For the notion that the head of a corporate body is obliged to cooperate with the members, which Tierney considers to be central to Durant's argument,[83] is entirely different from the notion {225 | 226} that the old law can only be followed with the help of reason and good advisers, which is what Rivière had

80 Tierney, *Foundations*, 194: "Once again one finds the blending of a hierarchical view of the Church with a corporative view."

81 Ibid., 193–4: "He too regarded the papal authority of divine origin but not as the source of episcopal jurisdiction."

82 Ibid., 196: "The distinctive contribution of Guilielmus Durantis was to show how the natural desire of the bishops to defend their own status, which in itself seemed likely to produce only a disruptive particularism, could be expressed in a more constructive form through their corporate association in a General Council; his work provides an interesting link between the current theories of episcopal authority and later conciliar doctrine."

83 Ibid., 194: "The totality of all the churches formed a corporate unity of which the Roman church was 'head', but headship in such a 'body' did not imply an absorptive and absolute authority over all the members."

regarded as central.[84] Finally it deserves to be underscored that Tierney's reference to Durant's proposal that the council should have some say over papal finances introduced a new element into the discussion that had previously been completely overlooked. Tierney's treatment of Durant deserves to be called the most stimulating to date.

That makes it all the more worth noting that since then the conciliar theory proposed in the *Tractatus de modo generalis concilii celebrandi* has nowhere been seriously addressed—even though in the meantime the Catholic Church witnessed the meeting of the Second Vatican Council and many informative books have been written about late medieval councils. Apart from isolated and generic references to Durant's significance, there are only three studies that deserve to be mentioned here, and they do not really add anything new to our understanding of Durant's conciliar theory.

In his book on the Council of Vienne, Joseph Lecler, S.J. (1895–1988) wrote a good, concise overview of Durant's life and the contents of the *Tractatus*, but dealt only superficially with Durant's conciliar theory.[85]

Louis Vereecke, C.SS.R. (born 1920), an adviser to the Congregation for the Doctrine of the Faith, published an article on the reform of the church in 1976 in which he included a description of Durant's treatise that was entirely limited to paraphrase.[86] Its chief merit was perhaps to have made readers of *Studia Moralia* more familiar with the *Tractatus*.

Finally, Ernesto Bellone examined Durant's proposals for the reform of education and their place in history.[87] Given his focus on this particular aspect of Durant's ideas, it is no wonder that he paid no attention to conciliar issues.

Two general observations may be appropriate at the end of this survey. First, I hope to have shown how clearly both confessional affiliations and contemporary historical circumstances are reflected even in a mirror as tiny as the study of a single relatively unknown medieval author. That such factors stand in the way of an adequate understanding of the *Tractatus* seems obvious. Indeed, as I have already suggested, they must be considered to figure largely among the reasons why there has been little progress beyond Heber's position of long ago that Durant did not have any well-developed theory at all. Only a

84 See above, n. 55.

85 Lecler, *Vienne*, 38–50.

86 Vereecke, "Réforme de l'église," 286–304. Vereecke is also known for *Conscience morale et loi humaine selon Gabriel Vazquez*, based on his 1949 dissertation at the Pontificia Universitas Gregoriana.

87 Bellone, "Cultura e studi," with extracts from Durant's treatise ibid., 97–107. Cf. Bellone, *Cultura e l'organizzazione*.

comprehensive study of the *Tractatus* can {226 | 227} determine whether or not this claim is justified.

Second, it deserves to be noted that, with the exception of Tierney, historians of the conciliar movement have ignored Durant almost entirely. Given how deeply they have been agitated by questions about the origins of conciliarism, that is a striking omission. Even Hirsch and Seidlmayer barely considered the *Tractatus* worth more than a footnote.[88] In recent years such neglect may perhaps be explained as a consequence of the aftermath of the Second Vatican Council and the intensity with which it focused scholarly interest on the Councils of Constance and Basel and the historical and dogmatic significance of their decrees. That focus helps to understand why, at least in the case of Durant, the stimulus Tierney gave to research into the origins of conciliarism has had no further results.

4 Outlook

I hope it will not be taken amiss if I turn to the results of my own research by way of conclusion.[89] In an article published in 1978 I presented information about the surviving manuscripts.[90] It established that only two manuscripts contain the text of the *Tractatus de modo generalis concilii celebrandi* in its entirety,[91] and pointed out that there were three more or less fragmentary manuscripts that had never been noticed before.[92] It also drew attention to the possibility that the papal library in Avignon may have contained a manuscript of the *Tractatus* that stemmed from Durant himself, but is no longer extant today. Combined with an overview of the various printed editions of the *Tractatus* that were published in the sixteenth and seventeenth centuries, it drew on the names of the book's identifiable owners and readers to show that William Durant the Younger may have exercised a measure of influence on

88 Hirsch, *Ausbildung der konziliaren Theorie*, does not deal with Durant's treatise at all, and Seidlmayer, *Anfänge des Schismas*, 177–8, merely repeats the views of Posch.

89 Since I have regularly identified the confession of the scholars I have dealt with here, I should not conceal it from my readers that I am baptized Russian Orthodox, but grew up in a Protestant environment.

90 See above, chap. 1.

91 Paris, Bibliothèque Nationale, ms. lat. 1443, and Munich, Bayerische Staatsbibliothek, Clm 6605, fols. 2–69^{v}.

92 Vatican City, Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823, fols. 23–53; Rome, Biblioteca Nazionale Centrale, Fondo Varia ms. 1, fols. 85–196^{v}; Zurich, Zentralbibliothek, ms. S 204 0, fols. 129–41.

thinkers and scholars of the rank of Nicholas of Cusa and Pierre Pithou that is worth taking seriously.

In an article published in 1981 I examined the manuscripts in order to determine the reliability of the printed editions.[93] It demonstrated {227 | 228} that all of the printed editions must have been based on what was probably a single, badly corrupted medieval manuscript that has been lost since then, and to which the editions owed the badly misleading shape in which they reproduced the treatise. That was the main reason why no one had previously noticed that Durant's treatise comprised, not one, but two entirely different works. The first, by far the longer, which I have called *Tractatus maior*, was a handbook of canon law, particularly ancient conciliar law, compiled in order to address the question of church reform. The second, *Tractatus minor*, was a pamphlet, or perhaps a sermon, in which Durant announced his ideas in a highly condensed fashion to the Council of Vienne. Both works were written on the occasion of the Council. Discovering that, and how, they are to be distinguished from each other made it possible to expose the supposed lack of order with which the *Tractatus* had been charged for so long as a myth that was based entirely on the flaws of the printed editions. The *Tractatus minor* is systematically organized according to topics, and the *Tractatus maior* consistently follows the sequence of the ancient councils as Durant found them in his most important source, the Pseudo-Isidorian collection.

These results reveal that a good many of the assertions made in earlier studies were unfounded. They also lay a foundation for a better understanding of the *Tractatus* than was possible as long as scholars placed uncritical trust on the printed editions. That makes it all the more urgent to prepare a critical edition in order to give scholars access to the new textual foundation that has thus been secured. It is equally necessary to move forward to a detailed analysis of the theoretical problems remaining to be solved. A convincing study of Durant's ideas will have to be framed in terms that are not preconceived, but drawn directly from research into the text itself in order to answer the question how exactly Durant justified his conciliar proposal and what he hoped to achieve with it. Only on the basis of such a study will it be possible to go beyond interpretations laboring under misleading distinctions between supposedly pro-papal and anti-papal positions and arrive at a proper understanding of Durant's attitude towards the papacy. It will be important to take a closer look at the significance for Durant's thinking, not only of the ideas of thirteenth-century canonists, but also of the revival of Aristotelian political theory,

93 For details see above, chap. 2.

perhaps as mediated by Thomas Aquinas. Finally, Durant's place in the development of different branches of the conciliar movement will need to be determined with greater precision than has happened so far, both by tracing the influence he exercised on later thinkers and by showing more clearly how his ideas differed from those proposed in Constance and Basel.

CHAPTER 4

Quod omnes tangit ab omnibus approbari debet: The Words and the Meaning

> Human beings are governed by two things, namely, by natural law and moral conventions.
>
> GRATIAN[1]

•••

> The sovereign, bearing only one single and identical aspect, is in the position of a private person making a contract with himself, which shows that there neither is, nor can be, any kind of fundamental law binding on the people as a body, not even the social contract itself.
>
> ROUSSEAU[2]

1 Introduction

At the level of greatest simplicity, intellectual historians can be divided into two groups: those who deal with words and those who deal with thoughts. Because thoughts are the more interesting of the two, much attention is focused on understanding the origin, evolution, and influence of, in an ascending order of complexity, ideas, theories, the thought of single individuals, and the thought of communities that are united by their adherence to the rules of certain disciplines, such as jurisprudence, philosophy, and theology. The study of 'objective spirit,' i.e., the thought of communities not united by any discipline, was once most prominently advocated by Hegel, and then seems to have fallen somewhat out of favor. More recently, French intellectual historians

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1 "Humanum genus duobus regitur, naturali videlicet iure et moribus." D. 1 d. a. c. 1.

2 Rousseau, *Social Contract* 1.7, trans. Cranston, 62–3: "Ne pouvant se considérér que sous un seule et même rapport il [Souverain] est alors dans le cas d'un particulier contractant avec soi-même: par où l'on voit qu'il n'y a ni ne peut y avoir nulle especе de loi fondamentale obligatoire pour le corps du peuple, pas même le contract social." Rousseau, *Contrat social* 1.7, in *Oeuvres complètes*, ed. Gagnebin and Raymond, 3:362.

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have succeeded in reviving it under {21 | 22} the name *mentalité*, and in extending its scope to include people at the lower end of the social scale, to whom previous historians would only reluctantly have attributed the possession of mind at all—or so it is believed.

The historian of thoughts, however, faces a predicament: on the one hand, thoughts can only be identified by the words with which they are expressed but, on the other hand, it is by no means necessary to use the same words to express the same thoughts. Especially if thoughts are complicated, or expressed in more than one language, the words used to express an identical thought may be very different indeed. This makes it difficult to be sure that the thought under investigation is a single object, and not many different ones. Is it, for example, really possible to say that such different thinkers as Aristotle and Thomas Aquinas were discussing the same idea when they spoke about justice? Is there such a thing at all as 'the same idea'? Is there a 'theory of the state,' which unites the writers discussed in the textbooks of the history of political thought? How does one ascertain that there is something specific to which the terms 'objective spirit' and *mentalité* can meaningfully refer, not to mention the difficulty in finding out the moment at which one *mentalité* may change into another? The point here is not to deny the possibility of positive answers but rather that the mere possibility of asking the questions confronts the historian of thoughts with extraordinary methodological difficulties.

This gives the historian of words a distinct advantage. Precisely because he can always refer his questions to a material object, something consisting of audible or visible signs, rather than of invisible thoughts, it is less difficult for him to be sure of the identity of his object. The history of words is almost as easy to write as it is to read and date the documents in which the words are found. Historians of words are able to achieve results which would make others blush. Unlike the history of an idea, which is often difficult to trace even within a single language, the history of words may sometimes be pursued across the boundaries of several languages and over many centuries. The word 'paradise,' to give a simple example, can be traced from modern Western European languages to Latin, Greek, Hebrew, Arabian and Avestan.[3] In some cases, such as the language, or languages, from which the various Indo-European dialects arose, it even seems possible to infer the existence of words in the past of which, excepting the words which descended from them, no trace exists in the present.[4] Undoubtedly these matters are subject to questions of their own. But which historian of thoughts would not love to be able to

3 *Oxford Dictionary of English Etymology*, 649, s.v. 'paradise.'

4 Indoeuropean 'gʷōus,' for example, has been inferred from descendants such as the English 'cow,' German 'Kuh,' Armenian 'kov,' Sanskrit 'gaus,' and other forms of the same word; ibid., 223, s.v. 'cow.'

infer the ancestry of present ideas and theories, not to mention anything more complex, with an equal degree of certainty?

To separate the history of words from that of their meaning in this way is, of course, simple-minded. No etymological investigation can afford {22 | 23} to ignore the meaning of the words concerned, and since there is no meaning where there are no words, no historian of thought can get along without studying words. The point of the distinction is rather to highlight the extraordinary advantage accruing to intellectual historians who enjoy the privilege of dealing with thoughts enshrined in words that keep recurring over long periods of time without significant changes. Given the extraordinary number of possible combinations of words, the probability that two different writers would accidentally choose the same words to express a certain thought is remote enough in practice to be considered negligible as soon as the text concerned approaches anything like the length of a sentence. Different writers who write the same words do not do so by chance. Whatever the particular channels may have been by which the text was transmitted, there is that real continuity of thought which is called a tradition.

The advantage of studying textual traditions is, however, not that the same text always corresponds to the same thought. If that were the case, the historian could do no more than compile a complete chronicle of the various occurrences of the text and the corresponding thought in question—not a particularly revealing exercise, and not really a history in that sense of the word which implies the understanding of change. It is rather exactly the opposite, namely that the same text does not always correspond to the same thought. Just as the same thought may be expressed with different words, the same words may express different thoughts. When sufficient time has elapsed, one can be virtually certain that the meaning of a particular text will no longer be what it once was.

Textual traditions thus are unique among the many sources on which historians can draw, because they preserve the record of changing thoughts in the form of identical, easily recognizable texts. Once the existence of a tradition has been established by the preliminary, but essential, exercise of recording where and when a particular text was quoted, the study of such a tradition permits the intellectual historian to understand the changing fortunes of the thought transmitted by it. As Aristotle pointed out, change cannot be understood unless there is something which is subject to it without itself changing. Prime matter is what he called the ultimate substratum of all change.[5] Textual traditions, one might say, are the prime matter of intellectual history.

5 Aristotle, *Physics*, 1.8 and 2.1, ed. Ross, 191a31–2, 193a29.

These are the reasons that account in large part for the peculiar fascination of studying the history of law. Laws, as well as the commentary given on them by jurisconsults, because of the weight of the interests they carry, have a way of changing their wording much more slowly than is usually the case in the more strictly 'intellectual' disciplines, in which no other {23 | 24} interests than those of the intellectuals concerned determine the choice of words. Accordingly they represent a particularly fruitful field of investigation for historians interested in the rules which govern the history of thoughts in general, and of the idea of justice in particular.

In addition to these considerable advantages, however, the stability of legal traditions presents interpretive dangers of its own. Whereas differences in wording make it difficult to perceive an underlying continuity of thought, identical wordings, on the contrary, make it difficult to perceive a change of thought. Because historians are trained to discover continuities, they are by definition predisposed to assume a continuity of thought where only a continuity of wording has been demonstrated. The temptation to suppose that the meaning associated with certain words on one occasion must be the same on others is a danger to which all of them are sometimes exposed. For students of legal traditions, however, the risk of failing to probe the depths of historical change by rashly imposing the same interpretation on the same text in different contexts is peculiarly great. The only way to guard oneself against it is to interpret every occurrence of the text concerned separately from the others. Unfortunately, this makes the task of unraveling the vicissitudes of a tradition rather cumbersome. Ultimately, however, there is no other way to reach a real understanding of how changes in thought occur.[6]

2 *Quod omnes tangit ab omnibus approbari debet*

The remainder of this essay is intended to illustrate the difficulties incumbent on the study of textual traditions with a specific example, which is taken from the history of the idea of popular sovereignty. It is the use made of the famous maxim that *Quod omnes tangit ab omnibus approbari debet*, "What touches all

6 For a different treatment of related methodological questions, see Quentin Skinner's articles "Meaning and Understanding in the History of Ideas," "Conventions and the Understanding of Speech Acts," "Some Problems in the Analysis of Political Thought and Action," and his applications in *The Foundations of Modern Political Thought*. More recently LaCapra, *Rethinking Intellectual History*.

must be approved by all," henceforth referred to in abbreviation as QOT, by William Durant the Younger, bishop of Mende from 1296 to 1330.[7]

On the one hand, QOT forms the subject of a particularly venerable tradition.[8] In spite of minor changes in the specific wording, the number of instances in which the maxim's key terms *tangere*, *omnes*, and *approbare* or *comprobare* are identical, not to mention explicit references to the original source of the text, is large enough to establish a continuity extending from the period of classical Roman law down to the end of the Middle Ages and into early modern times.

On the other hand, the danger of confusing the stability of this text with that of its meaning is unusually great. The reason is easy to understand: most modern readers, historians included, are citizens of representative {24 | 25} democracies. At first sight, they will find it hard to imagine that "What touches all must be approved by all" could mean anything other than that the right to make the final decisions in the body politic belongs to the people. In this way QOT is given the meaning of the idea of popular sovereignty.

This is a perfectly reasonable reading. It can be a particularly pleasing one, too, because it not only affords historical precedents for democracy, thus indirectly supporting the justice of the democratic state, but also seems to exonerate from the charge of illiberalism the times at which QOT is prominently used. These are powerful attractions for anyone who feels respect for medieval men and modern democracies at the same time. They may only too easily provoke even the most careful analysts to impose the democratic interpretation, or one of its variants, on QOT in contexts in which they are not justifiable. That is precisely why the democratic reading of QOT is the most suspect. The cases in which it may be accepted can only be determined by the kind of detailed analysis which will be provided on the following pages.

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7 For literature on the author and his work, see below, n. 36.

8 The following titles set the immediate context of the present essay: Post, " 'Plena potestas' and Consent"; Post, "Romano-Canonical Maxim"; and Post, " 'Ratio publicae utilitatis'," all of which were republished in Post, *Studies in Medieval Legal Thought*; Post, "Copyists' Errors"; Post, "Vincentius Hispanus"; Congar, "Quod omnes tangit," and Congar, "Status Ecclesiae," both of which were republished in Congar, *Droit ancien*; Marongiu, *Il Parlamento in Italia*, esp. 34–46, translated and abridged by S. J. Woolf as *Medieval Parliaments*; Marongiu, "Principio della democrazia," republished as "Principio della partecipazione" in Marongiu, *Dottrine e istituzione politiche*, and translated as "Theory of Democracy"; Hall, "King Henry III"; Giesey, " 'Quod omnes tangit' "; McIlwain, "Medieval Estates"; Ullmann, *History of Political Thought*; Oakley, "Celestial Hierarchies Revisited"; Tierney, *Foundations*; and Tierney, *Religion*. Rarely cited in English-speaking countries, but crucial for an understanding of medieval political thought, is O. Brunner, *Land und Herrschaft*.

There is no point in duplicating the considerable effort which has been expended for the sake of illuminating the origin, transmission, and significance of QOT in the many contexts in which it has appeared. But in order to understand the issues raised by Durant's text, it is necessary at least to give a brief summary of the results of that research.[9]

The basis of the textual tradition which is here at issue can be found in Roman law. According to the traditional Roman view, as enshrined in the formula *senatus populusque Romanus*, the Roman people played a considerable role in the exercise of public power.[10] Famous laws, like the *lex de imperio*, also known as the *lex regia*, according to which the power of the emperor was conferred upon him by the people, continued to endorse that democratic tradition even during the times of the rather undemocratic Roman Empire.[11]

The danger of misreading QOT as a Roman principle of democracy is nevertheless quite remote. The purposes for which it was used in Roman law are designed to prevent even unsuspecting readers from seeing more than is there. The Justinian law which forms the *locus classicus* on which later references to QOT rely, for example, is concerned with a rather technical aspect of the rules governing the administration of a tutelage held by a group of tutors. It establishes equality between four different kinds of tutors by arguing that, for all four kinds, a single member of the group may act for his pupil on behalf of all the others, provided their rights of tutelage are identical and not distinguished according to geographic region or substance. It then makes an exception by suggesting that, when tutelage is to be ended, every member of the group of tutors must give his consent. QOT {25 | 26} provides the reason for this

9 The most informative are Post, "Romano-Canonical Maxim," Congar, "Quod omnes tangit," and for the fourteenth century Marongiu, "Theory of Democracy."

10 "Lex est, quod populus Romanus senatore magistratu interrogante, veluti consule, constituebat. plebi scitum est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat. plebs autem a populo eo differt, quo species a genere: nam appellatione populi universi cives significantur connumeratis etiam patriciis et senatoribus: plebis autem appellatione sine patriciis et senatoribus ceteri cives significantur." Inst. 1.2.4. Cf. Berger, *Dictionary*, 636, s.v. 'populus Romanus,' 696, s.v. 'senatus populusque Romanus.'

11 The *locus classicus* is Ulpian: "Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat." Dig. 1.4.1. See also Inst. 1.2.6. Important for an understanding of the limitations theoretically imposed on imperial power is the restriction added in the following law: "Ex imperfecto testamento nec imperatorem hereditatem vindicare saepe constitutum est. licet enim lex imperii sollemnibus iuris imperatorem solvit, nihil tamen tam proprium imperii est, ut legibus vivere." Cod. 6.23.3. Cf. Berger, *Dictionary*, 550–1, s.v. 'lex de imperio.'

exception.[12] Without using the same words, Ulpian and Papinian invoke it in the matter of water rights.[13] The idea is similarly present in a few other texts dealing with the rights of groups of plaintiffs and defendants.[14] The communities of which QOT speaks are thus never the people, but only groups of individuals tied together by the possession in common of certain rights which are restricted to the sphere of private law.

The meaning which QOT has in the context of Roman law can be defined still more precisely by focusing on a sentence of Paulus. It states that, in lawsuits concerning more than one person, one must judge in the presence of all who are touched by it, because the decision of the judge will bind only those who are present.[15] That decision could be appealed, of course, but in the end it would still be made by a judge, and not by the group of individuals concerned. QOT thus did not grant ultimate authority over any rights to the group holding them. It merely protected the members of a group of individuals by imposing a certain procedure on the judge who decided the point at issue when their rights were contested. So long as the proper procedure had been followed, no one was free to withhold his consent from the decision.

In general, the meaning of QOT in Roman law must thus be carefully distinguished from the idea of popular sovereignty. It can be characterized as a principle of private law used to prove that, when the rights of a group of individuals were in question, a certain procedure had to be followed in order to arrive at a judgment binding the entire group. The consent of which it spoke must equally carefully be distinguished from the 'political' or 'sovereign' consent implied by a principle of democracy. Terms that have been suggested for this purpose are 'judicial,' 'procedural,' and 'compulsory' consent; all of them are useful.

12 "Sed haec omnia ita accipienda sunt, si non res quae agitur solutionem faciat ipsius tutelae, ut puta si pupillus in adrogationem se dare desiderat. etenim absurdum est solvi tutelam nec consentiente, sed forsitan et ignorante eo, qui tutor fuerat ordinatus. Tunc etenim, sive testamentarii sive per inquisitionem dati sive legitimi sive simpliciter creati sunt, necesse est omnes suam auctoritatem praestare, ut, *quod omnes similiter tangit, ab omnibus comprobetur*." Cod. 5.59.5 (my italics). Cf. Post, "Romano-Canonical Maxim," 197, 200; Congar, "Quod omnes tangit," 210–11. Since the main point of this law is to grant authority to individual tutors to act on behalf of the others, it is incorrect to state that according to QOT the tutelage should be exercised jointly, as does Marongiu, *Il Parlamento*, 37.

13 Dig. 39.3.8, Dig. 3.5.30.7. Cf. Post, "Romano-Canonical Maxim," 200–9; Congar, "Quod omnes tangit," 211.

14 Dig. 3.31.1, Cod. 3.40.1. Cf. Congar, "Quod omnes tangit," 211.

15 "De unoquoque negotio praesentibus omnibus, quos causa contingit, iudicari oportet: aliter enim iudicatum tantum inter praesentes tenet." Dig. 42.1.47. Post, "Romano-Canonical Maxim," 201, 203.

'Procedural consent' is probably best suited to express the substantive point at issue, and 'compulsory consent' is recommended by the power of an oxymoron to impress upon the memory that QOT in itself has little, if anything, to do with popular sovereignty.[16]

At the same time, however, it should be underlined that the rights established by QOT were not only significant in themselves, because they imposed limits on the power of a judge, but also capable of considerable extension in a political system in which the borderline separating private from public law was no longer as clear as it had been in Roman times, and in which the supreme political authority was defined as primarily that of a judge.[17] Under such circumstances, it could very well be transformed so as to become, if not the principle of democracy itself, at least its root.

Such a political system came into existence in the Middle Ages. The ground was prepared in the centuries following the demise of the Western {26 | 27} Roman Empire by the establishment of a society which, for the lack of a better word, may still be referred to as feudal. There, the exercise of public authority was so closely related to the possession of private, especially landed, property that the distinction between public and private became all but meaningless.[18] Medieval rulers, moreover, considered the right to render final judgment in all cases concerning the people under their control as an essential, if not the essential, characteristic of their power. This may be said of the pope as well as of the emperor, the kings, and the local lords.[19]

Such conditions help to explain why, as soon as the general revival beginning in the tenth century permitted a revival of legal science, QOT, benefiting from a general trend, began to be extended to matters to which it had not been applied in antiquity. Not unnaturally, the lead was taken by the institution

16 For the distinction between the two kinds of consent and the procedural origins of QOT, the articles by Gaines Post cited above, n. 8, are seminal. See especially "Romano-Canonical Maxim," 197–9, 247–51.

17 Ulpian on the Roman separation of the private from the public law: "Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus consistit. privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus." Dig. 1.1.1.2.

18 See, e.g., O. Brunner, *Land und Herrschaft*, esp. 120–46, with a critique of the application of nineteenth-century terminology to medieval conditions. Bloch, *Société féodale*, esp. 495–516, is also pertinent.

19 See, e.g., Marongiu, "Momento tipico," 385–510, rpt. in Marongiu, *Dottrine*, 109–51, Bloch, *Société féodale*; on Philip IV's conception of his power, see Strayer, *Reign of Philip the Fair*, 191–236; on the papacy, Feine, *Kirchliche Rechtsgeschichte*, 336–38.

which had the deepest roots in the late Roman Empire: the church.[20] Long before its use was formally endorsed by Pope Lucius III, Roman law may have played a part in Gregory VII's plan to establish the church on what he considered to be its true foundations.[21] Because he referred to it on several important occasions and specifically recalled its origin in Roman law as a reason for the respect it could command, the pontificate of Innocent III marks an important stage in the history of QOT.[22] His bull of convocation for the Fourth Lateran Council, issued in 1213, deserves particular attention in this regard.[23]

The church thus opened the channels by which QOT entered the realm of medieval public law and politics. During the period following the pontificate of Innocent III, it was applied to a variety of new subjects, even while its ancient use as a principle of procedural law remained in force.[24] English lords and prelates thought it entitled them to reject demands for taxation made by the papacy; the French used it similarly.[25] Its meaning was subjected to subtle

20 Post, "Romano-Canonical Maxim," 248–9, and Hall, "King Henry III," 144, for example, agree that the clergy, especially Stephen Langton, are responsible for the popularity of QOT in thirteenth-century England. On the other hand, Congar, "Quod omnes tangit," 232–3, points to the role of the University of Bologna in an attempt to explain the earliest political uses of QOT in Italy.

21 See Fuhrmann, "Reformpapsttum und Rechtswissenschaft"; Kuttner, "Revival of Jurisprudence"; and Pope Lucius III in X 5.32.1. Cf. Congar, "Quod omnes tangit," 211.

22 Innocent III, dealing with the nomination of rural deans by bishop and archdeacon, stated that "quum juxta imperialis sanctionis auctoritatem ab omnibus quod omnes tangit approbari debeat, et quum commune eorum decanus officium exerceat, communiter est eligendus, vel etiam amovendus." X 1.23.7.6. Cf. Post, "Romano-Canonical Maxim," 202–3; Congar, "Quod omnes tangit," 210–12.

23 Speaking of his reasons for calling the council, Innocent referred to the idea of QOT without using the text: "Habito super iis cum fratribus nostris et aliis viris prudentibus frequenti ac diligenti tractatu, prout tantae sollicitudo propositi exigebat, hoc tandem ad exsequendum praedicta de ipsorum consilio providimus faciendum, ut quia haec universorum fidelium communem statum respiciunt, generale concilium juxta priscam sanctorum Patrum consuetudinem convocemus." *PL* 216:824. Cf. Congar, "Quod omnes tangit," 215.

24 On the use of QOT as a principle of procedural law in the thirteenth century, see Post, "Romano-Canonical Maxim," 200–9; Congar, "Quod omnes tangit," 212–15. For thirteenth-century public law, especially in the context of taxation, see Post, "Romano-Canonical Maxim," 209–15; Congar, "Quod omnes tangit," 215–39.

25 A particularly important precedent for the use of QOT by William Durant the Younger can be found in a letter by Bishop William of Amiens and Archbishop William of Rouen of 1282 that was provoked by the disagreement between the mendicants and the French bishops over the privilege *Ad fructus uberes* granted to the mendicants by Martin IV. It suggests that every metropolitan should hold a provincial council and raise money so

jurisprudential analyses. The consent of a group qua group, which could be given by the decision of a majority, was distinguished from that of a group qua all of the individuals concerned, which could only be given unanimously.[26]

The culmination came during the last decades of the thirteenth and the first of the fourteenth century. It was during those years that rulers like Edward I quoted QOT to Boniface VIII as the reason why the English convoked parliaments when the state of their kingdom was to be discussed;[27] that it was relied upon by Philip IV when he gathered those assemblies that have a certain right to be considered the first of the general estates, and were to form such an important element in French constitutional history;[28] and finally, that it was given a new authority by its incorporation as nr. 29 among the rules of law with which the code of canon law issued by Pope Boniface VIII closes.[29] {27 | 28}

Given such powerful evidence, it is hardly surprising to find general agreement among scholars who have considered the question that, towards the end of the thirteenth century, QOT took on a much more important role than it had had in antiquity. Everyone also seems to agree that this role lay in the sphere of

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that the bishops could finance an embassy to Rome "ut communi omnium consilio, cum dictum negotium omnes tangat, via communis et utilis eligatur ad obviandum periculis memoratis et onus prosequendi negotium praedictum ab omnibus supportetur." Cited by Schleyer, *Anfänge des Gallikanismus*, 53. Cf. Glorieux, "Prélats français," 485 and n. 40, and Congar, "Quod omnes tangit," 221. According to Congar, "Quod omnes tangit," 237n107, 108, 239–40, Henry of Ghent, Godefroid of Fontaines, and their allies among the French secular clergy invoked QOT rather rarely, and Marsiglio of Padua never, because, as an Aristotelian, he avoided references to Roman law.

26 Post, "Romano-Canonical Maxim," 205–6; Congar, "Quod omnes tangit," 214; Marongiu, "Theory of Democracy," 405.

27 In 1300 Edward I wrote to Boniface VIII that "consuetudo est regni Angliae quod in negotiis tangentibus statum ejusdem regni requiratur consilium omnium quos res tangit." Quoted by Congar, "Quod omnes tangit," 237n106; in 1295 Edward I's famous parliament referred expressly to QOT; see Congar, "Quod omnes tangit," 235–6.

28 "Super pluribus arduis negociis, nos, statum, libertatem nostros, ac regni nostri . . . non mediocriter tangentibus, cum prelatis, baronibus et aliis nostris et ejusdem regni fidelibus et subjectis, tractare et deliberare volentes, mandamus . . . ut dicti consules et universitates, . . . per duos aut per tres de majoribus et pericioribus . . . plenam potestatem habentes, . . . hac instanti die dominica ante Ramos palmarum intersint Parisius, nobiscum tractaturi et deliberaturi super hiis, audituri, recepturi ac facturi omnia et singula, suumque, nomine consulum et universitatum predictarum, prebituri assensum in omnibus et singulis que super premissis et ea tangentibus per nos fuerint ordinatae." This is the very first document in Picot, ed., *Documents*, 1–2, a letter of convocation for the assembly meeting in Paris in April 1302. It invokes the spirit, if not the exact words of QOT. Cf. Congar, "Quod omnes tangit," 237–9.

29 "Quod omnes tangit debet ab omnibus approbari." VI *De regulis iuris* c. 29.

public law.[30] But whether or not it had now fully shed the qualities that had characterized it in ancient Roman law, and had become a principle of democracy instead, is a matter of much contention.

There are those, on the one hand, whose reading of QOT can only be understood as part of a general theory about the origin of the modern idea of popular sovereignty. The roots of that idea, they argue, can be found in the communities formed by the primitive tribes who invaded the Roman Empire during late antiquity and the early Middle Ages. The communal spirit believed to be typical of the societies formed during those centuries is for them the ultimate and lasting basis of the modern idea of democracy.

The absence of a clear distinction between private and public law, however, embroiled the common good with interests that were essentially private. The resulting confusion prevented the primitive idea of popular sovereignty for a long time from being given adequate expression. The obstacle was removed by the progress made during the eleventh, twelfth, and thirteenth centuries. Renewed familiarity with Roman law, the recovery of the political theory of Aristotle, with its fully developed doctrine of the common good, and last, but not least, the maturing of secular states directed by increasingly sophisticated structures all over Europe provided the needed insight. Towards the end of the thirteenth century, these developments culminated in the elaboration of constitutional theories and representative institutions, which combined to give proper form to the idea that public power derives from the people.[31]

According to such interpreters, it was thus no accident that QOT was applied to matters of public law. Its new uses were rather the result of a logical development of medieval political thought, searching for a means to combine the Roman idea of the state with the German idea of popular power.[32] QOT, distinguished by its brevity, provided a perfect formula. It stated the essence of what

30 Post, "Romano-Canonical Maxim," 247–51; Congar, "Quod omnes tangit," 215–21; Marongiu, "Theory of Democracy," 404–5; Hall, "King Henry III," 131.

31 E.g. Marongiu, *Il Parlamento*, 42: "In linea politica, il commune consenso sulla necessità e pratica delle grandi assemblee è evidente espressione di democrazia: democrazia, s'intende, in senso relativo, giacchè il popolo con il quale i sovrani avevano da trattare non era la somma degli individui, dell' uno e dell' altro sesso, delle democrazie moderne a suffragio universale, ma solo l'insieme dei non molti sudditi dotati di capacità giuridiche di diritto pubblico particolari." Ullmann, *Political Thought*, esp. 145–58, 200–28; much more moderately McIlwain's old, but still classic, essay "Medieval Estates," 665–715; Tierney, *Foundations*, and Tierney, *Religion*, may be seen as part of the democratic tradition.

32 Carlyle, *History*, 5:45–63, 128–40, esp. 140: "It is much more reasonable to recognise that the rise of the representative system was the intelligible and logical development of the fundamental principles of the political civilisation of the Middle Ages."

may, in the terminology of one such interpreter, be called the ascending theory of power.[33] It had become a principle of democracy and a form of the idea of popular sovereignty.[34]

Dissenting voices, as is only fitting for critics of a general theory, usually restrict themselves to pointing to the particular weaknesses of this interpretation. They do not deny the magnitude of the change signified by the transference of QOT to the realm of public law, which they agree was completed {28 | 29} around the year 1300. But they suggest that Germanic concepts of popular rule may be less important for an understanding of medieval representative institutions than the procedures of Roman law. That clerics, who were familiar with the Roman law, led the way in introducing QOT into medieval political discourse is for them a crucial factor. It explains why the meaning QOT had possessed in Roman procedural law effectively determined its meaning in medieval politics. True, it was now for the first time used to prove that the people should consent to the decisions of the supreme magistrate. At the very least, this shows that a community of the people had come into existence. But the consent of those national and ecclesiastical assemblies that QOT was now used to endorse was still 'procedural,' 'judicial,' and 'compulsory.' The time for democracy had not yet come.[35]

The point at issue must be underlined: it is not the principle of equality. All sides concur that 'the people' of medieval times differ remarkably from the electorate of modern democracies. In fact, it was almost invariably only their 'weightier part,' in the form of clerical, noble, or urban aristocracies that came to take the place of the whole. It is not the absence of any limitations on sovereignty either. Medieval men never abandoned their respect for the authority of the laws. Popular and monarchical governments alike were expected not to violate such laws without good reason. On the whole, the debate is thus not about absolute sovereignty, even though there may be some disagreement on the precise extent to which sovereigns were bound by the laws. The concept of 'the community of the realm' and the development of representative

33 Ullmann, *Political Thought*, 11–18, esp. 12–13.

34 As the title implies, Marongiu, "Theory of Democracy," maintains this view. It is revealing that the Italian reprint of 1979 changes *democrazia* to *partecipazione*.

35 Gaines Post has strenuously argued in this fashion. See esp. Post, *Studies*, 111, 116–17, 160–2, and "Romano-Canonical Maxim," 199, 214–15, 247–51; Congar, "Quod omnes tangit," 222–31; and Morrall, *Political Thought*, 65: "The tag *Quod omnes tangit ab omnibus approbetur* (What concerns all, should be approved by all) was not an assertion of embryonic democracy so much as a device of the monarchy to obtain a guaranteed assent of the realm to its demands." Oakley, "Celestial Hierarchies Revisited," 20, has attacked Ullmann for failing to take stock of Post's results.

institutions, moreover, most certainly stand for momentous changes in medieval politics, which allowed the people to play a much more important role than had previously been the case. Provided the presence of considerable inequalities among the members of the body politic and the limited nature of medieval government in general are kept in mind, the argument is thus not even about the participation of the people in the political process itself.

It is rather about the nature of the consent that the people were entitled to give to decisions concerning the fate of the body politic. According to the democratic view, it was within the rights of the people to grant or withhold their consent as they saw fit. According to those who subscribe to the term 'compulsory consent,' such was precisely not the case. The reason why they reject the concepts of democracy and popular sovereignty is that they imply the existence of a right of the people to determine their fate themselves. Such a right, they argue, did not exist. The authorities merely came to be obliged to convoke the people when decisions affecting the common good had to be taken, but they were not therefore subjected to the popular will. {29 | 30}

3 William Durant the Younger

In this context, the prominent role played by QOT in the work of William Durant the Younger becomes something of a test for the plausibility of the competing views. In order to appreciate its significance, it may be best to begin by simply giving the text of the passage in question. It occurs in Durant's major piece of writing, the *Tractatus de modo generalis concilii celebrandi*, written in response to Pope Clement V's request to submit reform proposals to the Council of Vienne, which took place in 1311–12.[36] It is probably the most

36 The best introduction to the life and works of William Durant the Younger is Viollet, "Guillaume Durant." The standard account of the Council of Vienne is E. Müller, *Vienne*. More recent, but brief, is Lecler, *Vienne*. The best edition of the *Tractatus de modo generalis concilii celebrandi* is by Jean Crespin, published in Lyon in 1531 under the title *De modo generalis concilii celebrandi tractatus*. It will be referred to by the number of part and chapter (or 'rubric') in the manuscripts (followed in square brackets by the number of part and chapter in the edition of 1531 whenever this differs from the manuscripts), as well as the folio and column in Crespin's edition, with superscript r and v standing for recto and verso, and a and b for the first and second columns. For the flaws of this and other editions, and especially for the distinction between *Tractatus maior* and *Tractatus minor*, see my "New View," above, chap. 2, with further references. The text and the form of Durant's quotations and citations from canon and civil law have been given as they appear in his writing. I have supplied the modern form of his citations in square brackets.

important, and certainly one of the most carefully phrased statements in the entire *Tractatus*, a work of considerable length:

> It would appear to be good advice for the republic and for the said administrators of the republic [i.e., the pope and the secular rulers] to limit their power by reason, as has been established in the preceding chapters, in such a way that the lord pope will not use the prerogative of his power without the considered advice of the lords cardinals, nor kings and princes their own without the advice of other good men—as it used to be observed in the republic before—particularly the power of making concessions contrary to councils and to laws approved by all, so that, contrary to the said councils and other laws, they will not be able to enact or concede anything new unless a general council has been convoked, since what touches all must, according to the rule of both canon and civil law, be approved by all.[37]

Terms such as 'the prerogative of power,' 'administrators of the republic,' and 'considered advice' (*certum consilium*) raise more questions than can be considered here. The main idea can nevertheless be outlined with relative ease. Durant suggests a two-tiered system of councils. He distinguishes between small, presumably permanent councils, consisting of the cardinals in the case of the pope and 'good men' in that of secular rulers, and general councils, which, as he says elsewhere, should meet every ten years.[38] The small councils are to be consulted whenever the rulers exercise the prerogative of their power. If one assumes that this covers all official actions, none at all, in other words, were to be performed without any consultation.[39] Certain particularly

37 "Videretur esse salubre consilium pro re publica et pro dictis administratoribus rei publice quod sic sub ratione, ut premissum est in rubricis proximis, limitaretur potestas eorundem quod absque certo consilio dominorum cardinalium dominus papa, et reges ac principes absque aliorum proborum consilio, sicut hactenus in re publica servabatur, non uterentur prerogativa huiusmodi potestatis, potissime aliquid concedendo contra concilia et contra iura approbata communiter, et quod contra dicta concilia et iura nihil possent de novo statuere vel concedere [*sic*] nisi generali concilio convocato, cum illud quod omnes tangit secundum iuris utriusque regulam ab omnibus debeat communiter approbari." *Tractatus maior* 1.4, fol. 7^{rb}.

38 "Quod [Romana ecclesia] nulla iura generalia deinceps conderet nisi vocato concilio generali quod de decennio in decennium vocaretur." *Tractatus maior* 2.96 [3.27], fol. 59ra.

39 "Propter quod prospiceretur non solum rei publice, sed eisdem [presidentibus spirituali et temporali potestati] quod omnia cum consilio agerentur iuxta dictum sapientis, et a iuris tramite nequaquam discederent nec postmodum peniterent." *Tractatus maior* 1.4, fol. 7^{vb}. The *dictum sapientis* refers to Prov. 13:10, 16. Huguccio and the *Glossa Palatina*, for

important actions are then singled out for special attention. They consist of concessions suspending existing conciliar or general laws and enactments of new general laws that conflict with old ones. Whenever such actions were contemplated, general councils should be convoked. It is this final point which is supported by the reference to QOT.

At first sight, the case may seem clear: QOT is here used in a general way to support the idea of popular sovereignty. When matters concerning the people as a whole, such as general laws, are to be decided, the people, {30 | 31} by means of general councils, must be asked for their consent. Durant apparently took it for granted that general councils were qualified to represent the approval of all, so that his proposal may with equal justice be called conciliar and democratic. It seems to provide exceptionally convincing evidence for the theory according to which QOT had by about 1300 become a principle of democracy.[40] A closer look at the evidence, however, suggests that matters are rather more complicated.

Earlier in his treatise, William Durant the Younger had said that "provisions need to be made to prevent the laws from being assailed with impunity."[41] His proposal for the reform of church and secular society was intended to answer this need. One general observation must therefore be made about it before all others: it was precisely . . . a proposal. He declared nowhere that according to already existing laws or principles the supreme authorities were obliged to consult with general councils. He rather considered this to be a new

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example, had already required the pope to consult the cardinals when issuing general law on the state of the church: "Generalem legem de universali statu ecclesie non potest sine cardinalibus condere." Huguccio, cited by Tierney, *Foundations*, 81; cf. Congar, "Status ecclesie," 27n125. "Quero utrum solus papa possit condere canones. Videtur quod sic, ar. xcvi in palea *Constantinus*. . . . Solutio, generalem legem de universali statu ecclesie non potest sine cardinalibus condere." *Glossa Palatina* on C. 25 q. 1 c. 6, cited by Tierney, *Foundations*, 81.

40 "Chronologically speaking, the first authoritative fourteenth-century acknowledgement of *Quod omnes tangit* seems to have been the reference to it by William Durandus the Younger . . . . In his hands the principle became exceptionally important; it became the justification and foundation of conciliar theory in its broadest sense. The supreme power in the field of Christian doctrine and Church discipline would be entrusted to an ecumenical council, superior to the Pope, kings, and princes. . . . Such a clear statement of the democratic principle was truly exceptional. It was to remain so." Marongiu, "Theory of Democracy," 405–6. In a contrary sense, Congar, "Quod omnes tangit," 245.

41 "Et provideretur ne in contrarium [i.e., contra quod in lege et in evangelio et in conciliis spiritus sancti instinctu probatis, ut xvi. dist. habeo [D. 16 c. 6], et in aliis humanis et comprobatis legibus et iuribus continetur] impune attemptaretur." *Tractatus maior* 1.2, fols. 4^{vb}–5^{ra}.

obligation which still needed to be ratified. He submitted it to the consideration of the council in the hope that his suggestion would be adopted. In a real sense it may, therefore, be called a bill for constitutional reform.[42]

On the one hand, this is enough to account for at least some of the apparent inconsistencies which have been exploited by more than one interpreter to reject a radical interpretation of Durant's views.[43] It is true, that, as far as existing law was concerned, he quite definitely stopped short of denying to the papacy the power to modify even such laws as touched on the state of the church. He never went further than to say that certainly the papacy should not alter such laws and that 'perhaps'—never more than 'perhaps' (*forsitan*)—it could not even do so.[44] He thus implicitly acknowledged the possibility that the pope actually could alter such laws. But the freedom with which this power had been exercised in the past was precisely what his proposal was intended to limit.[45] Durant's ideas must, therefore, quite definitely be considered radical. On the other hand, however, he was radical only in intention. He quite clearly thought that the limitations imposed on the rulers by existing law were insufficient. That alone explains the need he evidently felt for 'further limiting and regulating' the power of the ruler.[46] It therefore seems that he did not consider QOT to be a principle equipped with the kind of prescriptive force capable of subjecting popes and kings to popular sovereignty.[47]

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42 Note that the text of his proposal is designated as a *salubre consilium* and given in the subjunctive mood.

43 The most insistent among them is Torquebiau, "Gallicanisme." Similarly Viollet, "Guillaume Durant," 119, and E. Müller, *Vienne*, 593n27, 593n30. For a review of existing scholarship on Durant, see above, chap. 3.

44 Dealing with the exemptions that the papacy had granted to the religious orders, and which Durant considered an intolerable alteration of the general state of the church, he concluded: "Unde cum dominus papa tantam et talem observationem <mutare> [P] non debeat, nec *forte* valeat, ergo nec generales exemptiones, privilegia, libertates, et immunitates derogativas et preiudicativas honori, potestati, statui, ordinationi, et ordini dictorum episcoporum et ordinariorum contra predictam generalem ordinationem sic passim concedere non debet, nec etiam *forsitan* valet." *Tractatus maior* 1.4, *Rubrica de exemptionibus*, fol. 8va, my italics. The variant *mutare*, instead of the edition's *imitari*, is taken from Paris, Bibliothèque Nationale, ms. lat. 1443, fol. 8^{vb}.

45 Thus there is no qualifying *forsitan* added to the *quod . . . nihil possent de novo statuere vel concedere* in his proposal. See above, n. 37.

46 "Quarto specificatur amplius de limitando et regulando exercitio potestatis dictorum presidentium monarchie." *Tractatus maior* 1.4, fol. 7ra.

47 Tierney seems to have gone too far in stating that "in the first part [of the *Tractatus*, Durant] was content to establish the principle that a Pope alone could not override the legislation of previous Councils. . . . [He] seems to have overstepped the bounds of

Another observation increases this likelihood. A careful reading of the text cannot but reveal a remarkable fact: the council's right to consent, as supported by QOT, appears in a subordinate clause of Durant's proposal. In the main clause, he merely insists that councils should be convoked or consulted; he does not really demand a right of consent for them at all. {31 | 32} Neither does he anywhere directly address the question where in the body politic supreme political authority was to be found. In other words, there is a rather obvious logical gap between QOT, which may seem to give ultimate authority to the people, and the proposal Durant based on it.

It may be countered that there is no logical inconsistency, because the mere convocation of councils could, in practice at least, have established the equivalent of a formal right of consent. This is perfectly plausible and may very well render Durant's intentions correctly. The history of the Council of Vienne itself provides a case in point. Due to the refusal on the part of the assembled clergy to grant their consent, pope Clement V found it impossible to issue the formal conciliar judgment condemning the order of the Templars that he so much desired. He was forced to resort to a kind of executive order instead.[48] The will of general councils could not be simply ignored by the papacy, even without Durant's ideas having been adopted. At the same time the Council of Vienne

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Decretist thought in thus applying the *Quod omnes tangit* principle to the general legislative authority of the Papacy, for Joannes Teutonicus had maintained in a quite contrary sense that to deny the Roman See's right of establishing law for the whole Church was heresy." Tierney, *Foundations*, 195, with reference to the gloss of Joannes Teutonicus on D. 19 c. 5. Even though Durant did apply QOT to the general legislative authority of the papacy, he seems to have done so without contradicting the doctrine accepted by the gloss. See below, n. 66. Among the authors who share the view that Durant actually subjected the pope to conciliar authority are Haller, *Papsttum und Kirchenreform*, 65, and Scholz, *Publizistik*, 222–3.

48 The order was abolished "per modum provisionis seu ordinationis apostolice"; see E. Müller, *Vienne*, 197–9. The relevant bull, *Vox in excelso*, explains that proceeding "per diffinitivam sententiam canonice" was impossible because only a minority of the council was in favor; ibid., 211–13. Another wonderful example for the relationship between pope and council can be found in cardinal Stefaneschi's account of Clement V's renewal of the constitution *Super cathedram* in the final session of the Council of Vienne. Because it granted a fourth of mendicant income to the bishops, it was understandably opposed by the mendicants. The pope addressed the bishops thus: "Et illam *Super cathedram* innovavit seu renovavit; rogavit tamen prelatos ter diversis vicibus in eadem tertia sessione [concilii], quod aliquid benignitatis ostenderent religiosis, ultra quam dicatur in illa *Super cathedram*, maxime circa quartam; nam non possent alias vivere. Nichilominus tamen, si non consentirent prelati in aliqua mutatione illius *Super cathedram*, ipse papa sequebatur voluntatem ipsorum et ipsam, ut predictum est, renovabit." E. Müller, *Vienne*, 678–9.

also provides an example that the pope could choose quite frankly to override the council if he thought it proper to do so.[49] In the last analysis, however, the argument on the grounds of practice fails to address the theoretical point at issue. Even if, in practice, Durant's demand would have given the council the right of consent, he did not actually ask for it, so that the logical inconsistency is not accounted for.

Somewhat more to the point, it might also be suggested that QOT must not be so sharply separated from what has here been called Durant's demand, because the consent expected by QOT forms an integral part of it. But this solution must be rejected out of hand. The distinction between the obligation to obtain the advice of a corporate body and that to obtain its consent was well known. It had been carefully elaborated and can be shown to have been presupposed by any number of texts relating to such issues.[50] The lack of logical consistency in a sentence which, on the one hand, demanded merely consultation with general councils, and, on the other, their consent, had to be obvious. Nevertheless to insist that the inconsistent parts of his proposal served an identical purpose is asking for more than can be granted in the case of a statement that was not only carefully crafted in the technical language of an expert in the canon law, but also central for the success of the entire program outlined in the *Tractatus*.

If Durant merely demanded the convocation of general councils, the reason can thus only have been that he did not mean to demand their consent. Councils that were not explicitly entitled to withhold their consent from the decisions of the supreme magistrate and to enforce their own, however, can

49 Even though the pope had resigned himself to forego a formal sentence on the Templars, he insisted that, regardless of the council's wishes, he would have their possessions assigned to the Hospitallers, as reported by the Aragonese ambassadors of Jayme II on 22 April 1312: "Finalment dix lo papa als prelats, que, si ells conseylaven, que faes la dita applicatio al Espital, a ell plauria, que ho poguies fer de conseyl dells. Si no que ell ho faria e ho entenia a fer, volguessen ells o no!" Finke, *Papsttum und Untergang*, 2:299; the reference is in E. Müller, *Vienne*, 222.

50 On ecclesiastical traditions underlining the need for counsel, see the summary in Congar, "Quod omnes tangit," 222–31. On the distinction between counsel and consent, see, e.g., the following commentary by Hostiensis on X 3.10.5: "Dic ergo quod aliud est consilium sine quo nihil aut modicum gerere debet episcopus, aliud consensus qui non requiritur nisi in alienationibus . . . et aliis maioribus." Cited by Tierney, "Hostiensis and Collegiality," 405n14; cf. Tierney, *Foundations*, 109–17; Tierney, *Religion*, 39–42; Watt, "Constitutional Law," 127–57; Michaud-Quantin, *Universitas*, 138n50; much valuable information is also contained in Langmuir, "Per commune consilium regni," whose grounds for arguing against the consent supposedly demanded by Magna Carta are exactly parallel to the ones developed here for the case of William Durant the Younger.

hardly be considered as institutions designed to realize the idea of popular sovereignty. The essence of that idea is precisely that the question where the supreme political authority resides is explicitly addressed {32 | 33} and answered in favor of the people so as to prevent the monarch from overriding the will of a dissenting people.[51] The conclusion that, in Durant's mind at least, QOT did not yet support an idea of popular sovereignty seems unavoidable.

This conclusion can be corroborated by three further observations. First, it is worth remembering that Pope Boniface VIII had only recently given QOT the formal status of a rule of law. Rules of law, however, were not laws themselves, but interpretive principles used to guide canonists through the difficulties encountered in resolving what might appear to be conflicts among the laws. While they were capable of resolving difficulties arising from the laws, they lacked prescriptive force.[52] The relative weakness of a rule of law may thus explain in part why Durant could not have established a democratic position on such grounds alone.

The significance of rules of law, however, is a technical point, which is debated now and was debated then. Much greater weight may therefore be attributed to the second observation: that the need to convoke general councils is clearly restricted to cases in which existing legislation is to be changed (*contra dicta concilia et iura*).[53] Such a restriction conflicts with the idea of popular sovereignty. A sovereign people must be asked for their consent to all measures touching upon their affairs, and not merely to measures changing existing laws. Perhaps it is true that no new laws can avoid affecting old laws. The point, however, is that it does not seem to be the issuance of new laws in itself, but their effect on existing laws, that mattered to Durant. This suggests that he sought the legitimation of his ideas, not in popular sovereignty, but in the reverence to be accorded to existing laws.

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51 Note that in exactly this respect the Council of Constance's famous decree *Haec sancta* goes beyond Durant's suggestion by demanding obedience from the pope while restricting that requirement to matters of faith, schism, and reform; see *Conciliorum oecumenicorum decreta*, 408.

52 Medieval glossators of Roman law generally argued that rules of law are universally applicable but do not create law. Gratian and some of his successors argued that, on the contrary, rules of law have the force of law. But most of the canonists seem to have accepted the legists' point of view. Hostiensis, and especially Dinus Mugellanus, who may have collaborated on the rules of law appended to the *Liber sextus* and wrote an influential commentary on them, rejected Gratian's doctrine. But even for Joannes Andreae, the matter was still controversial. See Lefebvre, "Règles de droit."

53 See above, n. 37.

The most important observation by far is the third. Durant himself clearly indicated that his attempt to limit the supreme power of popes and kings was based on something other than the idea of popular sovereignty. In the words of his proposal, the power of the 'administrators of the republic' was to be limited by reason. The arguments supporting this position had been given in the previous chapters.[54] The purpose of his conciliar proposal was merely to suggest a specific course of action by which reason could be enabled to exercise its limiting function.[55] Reason, and not popular sovereignty, therefore provided the standard that justified the convocation of general councils.

The main results this analysis has reached so far may be summed up as follows. Durant did not state that popes and kings were bound by existing law, including the maxim QOT, to obey decisions made by the people or by assemblies representing them. He neglected to deal with the question whether ultimate authority over the body politic resided with popes {33 | 34} and kings or the people. He suggested that henceforth no general laws should be changed without the convocation of general councils, but he stopped short of demanding a right of consent for them. Because of its status as a rule of law, QOT may technically have been insufficient to support such a right. What justified the role envisioned by Durant for general councils was, finally, that he considered them capable of enabling reason to limit the power of the supreme authorities, but not that they represented the people.

Our main conclusion so far is, therefore, essentially negative. It consists of the discovery of a number of facts in Durant's text that conflict with the idea of popular sovereignty, and thus make the view according to which he considered QOT to be a principle of democracy rather unlikely. Because there had been

54 The relevant chapters are *Tractatus maior* 1.2–3, especially the *Rubrica de limitanda potestate superiorum*, fols. 5^{vb}–7^{ra}. Chapter 3 is entitled "Quod predictus modus correctionis et reformationis ecclesie et christianitatis sit conveniens rationi et iuri, maxime quantum ad presidentes spirituali et temporali potestati, et quod non debeant transgredi iura." *Tractatus maior* 1.3, fol. 5^{ra}.

55 Chapter 4 is entitled "Quarto *specificatur amplius de limitando et regulando exercitio potestatis dictorum presidentium monarchie*, ne in agendis absque <consilio proborum> [P] proprio utantur arbitrio, nec sine generali concilio <agant> [P] contra ea que sunt in conciliis a sanctis patribus provide constituta in dispensationibus, privilegiis, et exemptionibus, et aliis exercendis; quod revocent et revocare debeant exemptiones in contrarium concessas, *cum hoc esse utile et rationabile videatur*." *Tractatus maior* 1.4, fol. $7^{ra–b}$, my italics. This shows that the conciliar demand was merely an expansion of the previously considered principles. The readings *consilio proborum* and *agant*, instead of the edition's *concilio proborum* and *agantur*, are taken from Paris, Bibliothèque Nationale, ms. lat. 1443, fol. 6^{rb}. On the confusion between *concilium* and *consilium*, Congar, "Quod omnes tangit," 229, 245n132; Michaud-Quantin, *Universitas*, 135–41.

good reasons to regard such an interpretation as well-founded, even a purely negative result is not altogether superfluous.

Instead of knowing what he did not think, however, one would much prefer to know what he did think. The evidence which makes it possible to do that is found in the chapters to which Durant referred the reader for the arguments supporting his theory that the power of the rulers was to be limited by reason. It consists in a general statement about the essence of good government:

> If, therefore, the two who, as Pope Gelasius wrote to emperor Anastasius (D. 96 c. 10), govern humankind like servants of God, namely, ecclesiastical and royal authority, wish to aim at reform and a beneficial government of humankind, they must follow the aforesaid course, namely, govern themselves and humankind according to the contents of the Law [i.e., Deuteronomy], the Gospel, the councils approved by the Holy Spirit (D. 16 c. 6), and other approved laws and rights.[56]

In other words, the conduct expected of the authorities was not really open to choice. On the contrary, the norms of justice governing them were already in existence. They could be found in a clearly identifiable body of divine and human laws. Good government consisted in the faithful execution of these laws. In principle, it was therefore as unnecessary to consider the will of the rulers as that of the people. The function of government was rather like that of judges, who judge according to existing laws, but not about them;[57] of administrators, who are responsible for their decisions to an authority other than their own;[58] and of servants of God, rather than lords over the body politic, to use some of the terms found in the *Tractatus*.[59]

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56 "Si itaque duo a quibus regitur humanum genus sicut a ministris Dei, videlicet ecclesiastica autoritas et regalis potestas, sicut Gelasius papa scribit Anastasio imperatori xcvi. dist. duo sunt [D. 96 c. 10], vellent intendere ad dictam reformationem et salubre regimen humani generis, haberent viam amplecti predictam, ut videlicet seipsos et humanum genus regerent secundum quod in lege et in evangelio et in conciliis spiritus sancti instinctu probatis, ut xvi. dist. habeo [D. 16 c. 6] et in aliis humanis et comprobatis legibus et iuribus continetur." *Tractatus maior* 1.2, fol. 4^{vb}. Note the significant alterations in the text of D. 96 c. 10, which has *autoritas sacra pontificum* instead of *ecclesiastica autoritas*, and *principaliter* instead of *sicut a ministris Dei*.

57 "Ut enim Augustinus ait in libro de vera religione c. lx., in istis temporalibus legibus, quamquam de his homines iudicent cum eas instituunt, tamen cum fuerint institute et firmate non licebit iudici de ipsis iudicare sed secundum ipsas iiii. dist. in istis [D. 4 c. 3]." *Tractatus maior* 1.4, fol. $7^{rb–va}$. Cf. Lefebvre, *Pouvoirs du juge*, 69–81.

58 For the term *administratores*, see above, n. 37; cf. Hofmann, *Repräsentation*, 116–90.

59 For the term *ministri Dei*, see above, n. 56.

These convictions formed the basis of William Durant the Younger's political thought. They also conflict directly with the idea of popular sovereignty and, for this very reason, provide the key to an understanding of the {34 | 35} meaning he associated with QOT. In order to discover that meaning, however, it is necessary to take account of an additional factor.

Due to their general nature, laws alone are in principle insufficient to provide precise guidance for every question of justice. Often they need to be interpreted, but do not point to the interpretation that would permit their being properly applied to a doubtful case. Changing circumstances, moreover, are enough to lead to the emergence of a considerable number of situations in which the rulers will find themselves at a loss as to how to arrive at the proper decision.[60]

In order to resolve this difficulty, Durant, drawing on established canonical theory, argued that, besides the laws, there were principles of justice, of which the laws were merely an expression. Utility, equity, the highest good, justice, and reason are examples of such principles.[61] In practice this solution suffered

60 "Non enim debet irreprehensibile iudicari, si secundum varietatem temporum statuta quandoque varientur humana, presertim cum urget necessitas, vel evidens utilitas id exposicit, cum ipse Deus ex his que in veteri testamento statuerat nonnulla mutaverit in novo, sicut habetur ex concilio generali [Lateranensi IV]." *Tractatus maior* 1.4, fol. 8^{rb}, with references to D. 4 c. 2, D. 29 c. 1, C. 23 q. 8 c. 14, C. 32 q. 4 c. 6, C. 32 q. 4 c. 7, and X 1.36.11, X 4.14.8, and X 5.39.51. Durant did not even exempt conciliar laws from revocation or change at human hands. This is evident from the words with which he submits his collection of such laws to the consideration of the Council of Vienne: "Si aliqua in dicta specificatione casuum [canonum?] reperiantur utilia et universali ecclesie proficua, quod sacri provisione concilii super eorum observantia vel revocatione aut <immutatione> [P] vel declaratione deliberatio, si visum fuerit, habeatur." *Tractatus maior* 2, *Prefatio*, fol. 13va. The variant *immutatione* instead of the edition's *immitatione* is taken from Paris, Bibliothèque Nationale, ms. lat. 1443, fol. 17^{rb}.

61 "Porro, si pretendatur quod licitum est dispensare supra iura, responderi potest quod, cum dispensatio, sicut iuriste tradunt, sit provida iuris communis relaxatio, utilitate seu necessitate pensata per eum ad quem spectat, canonice facta, ut colligitur i. q. vii. §. nisi rigor discipli. et c. necessaria cum sequentibus [C. 1 q. 7 d. p. c. 5, C. 1 q. 7 cc. 6ff.], non est secundum iuristas censenda dispensatio sed dissipatio si aliter fiat, cum ius vulneretur ex ea xxiii. q. iiii. ipsa pietas circa finem [C. 23 q. 4 c. 24]." *Tractatus maior* 1.4, fol. 7^{vb}. "Non enim debent nasci iniurie unde iura nascuntur, sicut Innocentius tertius scribit extra de accusa. qualiter et quando [X 5.1.17], primo C. unde vi. meminerint [Cod. 8.4.6.] . . . . Cum itaque summum bonum in rebus sit iustitiam colere atque sua cuique iura servare, et in subditis non sinere quod potestatis est fieri, sed quod equum est custodiri, sicut Gregorius ad Constantiam reginam Francie scribit xii. q. ii. cum devotissimam [C. 12 q. 2 c. 9], ad hoc debent dominus papa et omnes reges anhelare." *Tractatus maior* 1.3, fols. 5^{vb}–6ra. "Regenda igitur atque limitanda et restringenda est sub ratione potestas ut totum ratio regat, sicut

from the obvious weakness that concepts like 'justice' and 'reason' are abstract. They can hardly impose unequivocal obligations on the conduct of government.

This was precisely the difficulty that his conciliar proposal addressed.[62] As he pointed out by quoting from civil law: "The more men are heard, the more manifestly the truth is discovered."[63] The number of the individuals assembled in general councils alone, therefore, was an argument in their favor. It overcame the inability of the authorities to pay sufficient attention to all of the matters within their competence.[64] Equally important, the members of general councils were *seniores* and *sapientes*, who could give more reliable

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Gregorius Mauritio imperatori scribit xi. q. iii. illa prepositorum [C. 11 q. 3 c. 67]." *Tractatus maior* 1.3 fol. 5^{vb}. For background to Durant's theory of law in general, see the following: Brys, *De dispensatione*; Kuttner, "Pope Lucius III"; Post, "Copyists' Errors"; Weigand, *Naturrechtslehre*; Gagnér, *Studien zur Ideengeschichte*; Klinkenberg, "Die Theorie der Veränderbarkeit"; Krause, "Dauer und Vergänglichkeit."

62 The central text quoted by Durant is D. 20 c. 3. This canon explains which written sources should be consulted, and in which order, if Scripture proved insufficient to give the desired answers. Crucial for an understanding of Durant's use of it is the procedure it recommends if no answer at all is found in any written source: "Quod si omnibus his inspectis huius quaestionis qualitas non lucide investigatur, seniores provinciae congrega, et eos interroga. Facilius namque invenitur, quod a pluribus senioribus quaeritur." The gloss explains s.v. 'seniores': "id est sapientes"; s.v. 'pluribus,' the gloss refers to Cod. 6.42.32.1 and Cod. 7.14.3, the two passages from civil law which Durant, too, quotes (see below, n. 63). D. 20 c. 3. is thus the basis of his conciliar proposal. There was nothing revolutionary in this doctrine itself, based, as it was, on Christ's promise: "Si duo ex vobis vel tres conveniunt super terram in nomine meo, de omni re, quamcumque petierint, fiet illis a patre meo." This is the formulation of Durant's source, D. 20 c. 3. The original is in Matt. 18:19–20. Huguccio had already suggested the convocation of *sapientes* as a means of last resort providing access to reason when existing texts were insufficient to resolve certain difficulties. On the role of reason in law, see, in addition to Post, "'Ratio publicae utilitatis'," Le Bras, Lefebvre, Rambaud, *L'âge classique*, 397–402; Lefebvre, *Pouvoirs du juge*, 28–66; Balon, "La 'ratio' "; Meijers, "Conflit"; Michaud-Quantin, *Etudes*, 195–211; and Caron, " 'Aequitas et Interpretatio'."

63 "Lex dicat quod per ampliores homines manifesta veritas revelatur de fideicom. l. ultima et C. de inge. manu. l. iii. [Cod. 6.42.32.1, 7.14.3]." *Tractatus maior* 1.4, fol. 7^{rb}.

64 "Nulli etiam dubium est quin pluribus intentus minor sit ad singula sensus. Unde, quamquam [presidentes spirituali et temporali potestati] sint dignitate ceteris altiores, interdum evenit propter <nimiam> [M] preoccupationem negotiorum sicut Gregorius in Pastorali ait, quod non sunt in agendis et in iudiciis ceteris certiores." *Tractatus maior* 1.4, fol. 7^{vb}. The reading *nimiam* instead of the edition's *minimam* is taken from Munich, Bayerische Staatsbibliothek, Clm 6605, fol. 5^{rb}.

answers to such difficult questions than the many, who lacked their training and experience.

These ideas are important for an appreciation of the extent to which confidence in the ability of the papacy to provide guidance to the 'republic' faded during the later Middle Ages. They also indicate how closely the emergence of 'reason' can be related to the interpretation of conflicting or inconclusive textual traditions. For our present purpose, however, it is more pertinent to note that, having travelled the route from the letter of the laws to that objective reason from which they took their authority, Durant arrived at a conclusion that maintained without change the fundamental conviction that government was bound to obey existing norms.

This explains the peculiar features of his theory that were discussed above. As far as his failure to consider the locus of authority in the medieval republic is concerned, the question never emerged, simply because the answer had already been given. Supreme authority did not reside in either the ruler or in the council, but in the laws, and, in the case of their failure to provide adequate answers, in their reason. Because, on the whole, laws could be presumed to express the norms of justice well, changes in existing {35 | 36} laws entailed a greater risk that such norms would be violated than any other measure.[65] That is why councils were convoked precisely when existing laws were to be changed.

The logical difficulty raised by QOT's mention of consent and its absence from Durant's demand can now also be removed: the basis of his proposal has been shown to consist of a general theory of law. He asked for the convocation of general councils because he thought that they were best qualified to provide the kind of proof required to justify changes in existing laws. Since, in matters of justice, proof is established by juries, the meaning of QOT can be clarified by comparing general councils with juries.

When a jury is convened, there are only two possible results: either the desired proof is found, or it is not. If it is, it must be considered a verdict, i.e., a true statement, *verum dictum*; if not, there is no verdict. Dissent from a verdict is thus impossible by definition, because the existence of dissent negates the existence of the verdict. When, on the other hand, a verdict has been reached,

65 "Unde prudenter aget dominus papa si in dispensationibus et aliis servet consilium Leonis pape in preallegato c. sicut [D. 14 c. 2]. Dicit enim quod sicut quedam sunt que nulla possunt ratione convelli, ita multa sunt que aut pro necessitate temporum aut pro consideratione etatum oporteat temperari, illa consideratione semper servata ut in hiis que vel dubia fuerunt aut obscura id noverimus sequendum quod nec preceptis evangelicis contrarium nec decretis sanctorum patrum inveniatur adversum." *Tractatus maior* 1.4, fol. 8ra.

consent to it has by definition already been given. The demand for the consent of a jury is therefore implicit in that for its convocation. That such consent, furthermore, differs fundamentally from the consent of a sovereign people hardly needs to be underlined.

It may of course be objected that a jury can fail to reach a verdict, either because it cannot come to any agreement or because the judge declares a mistrial. But here the analogy with juries breaks down. General councils were occupied with fundamental questions of justice, which could neither be denied nor referred to another institution; the general council's duty to reach a verdict was absolute. Nor could disagreement between council and pope be tolerated. As was agreed by all, Durant included, the pope could not be judged by anyone.[66] The vicar of Christ had the last word in matters of justice. So long as disagreement between council and pope continued, there was, therefore, no certainty that the truth had been discovered. To prefer the decision of the council to that of the pope would merely have meant to prefer one possible falsehood to another. In the case of general councils, in other words, there was no middle way between the extremes of complete agreement or an irremediable failure of justice.

The very success of Durant's proposal was thus predicated on the assumption that, once convoked, the council would automatically reach an agreement with the pope. Merely raising the question what to do when it did not would have cast a disastrous doubt on the conviction that the commands of justice could be discovered. To go beyond asking for the convocation of councils and that consent which followed from it automatically, and to demand a right for the council to have its will enforced even against that of the pope instead, would therefore have been self-defeating, to say the least. {36 | 37}

In this context, the terminology of QOT itself is suggestive. The key term of QOT is *approbare*. Because present usage fails to distinguish between 'approval' and 'consent,' both terms have so far been indiscriminately used to translate

66 Durant referred both to D. 21 c. 7, which stated that "prima sedes non iudicabitur a quoquam," and, in the very chapter that developed his conciliar proposal, to D. 40 c. 6, where the famous formula that "cunctos ipse iudicaturus a nemine est iudicandus, nisi deprehendatur a fide devius" is found; *Tractatus maior* 1.3, 1.4, fols. 6^{vb}, 7^{va}. It thus seems impossible to argue that he contradicted the teaching of the famous gloss on D. 4 c. 3, according to which the *sententia* of the pope should prevail over all others, "nam etiam error principis ius facit." Note that he did not concern himself with the possibilities opened by papal heresy. He was interested in developing a conciliar theory applicable to church government under ordinary circumstances. Papal heresy was an exception that would have been ill-suited to serve his purposes. On conciliar arguments based on the need to remove heretical popes, see Tierney, *Foundations*, and Tierney, "Pope and Council."

approbare. But it may be an error to do so without further qualifications. Approbare is etymologically related to 'proof,' whereas 'consent' is related to that 'sentence' which is properly pronounced by a judge. The 'approval' that was demanded by QOT and expected by Durant is thus more likely to have been the kind that was implicit in the duty to reach a verdict and followed automatically from the convocation of general councils.[67]

This makes it possible to understand the meaning that Durant associated with QOT. It had lost none of the procedural qualities that had characterized it from the beginning. True, it was now applied in the area of public law, but without granting ultimate authority to the people as represented by councils. The maxim rather served a different purpose: it supported the thesis that, when general laws had to be changed by concessions made against their tenor, or by the issuance of new laws, it was not enough to consult with the small councils made up by cardinals or good men, much less to rely on the decisions of the papacy or secular rulers alone. Reliable evidence to prove that such changes were in fact justified could only be obtained by convoking general councils, because they consisted of *seniores* and *sapientes*. "What touches all must be approved by all" therefore meant that the people had a duty to assist in determining the proper course of action to take in fundamental questions of justice. That duty may be said to have corresponded to a right, but merely a right to be consulted, and not to be obeyed. The reason why Durant could not have considered QOT equivalent to the idea of popular sovereignty has also been identified. It consisted of his faith that the body politic as a whole was subject to existing norms that were exempt from human control and could be found either in existing laws or that objective reason from which they derived their power.

4 Two Views of Order

What had been thought to be a particularly clear instance for the use of QOT as a principle of democracy has, on the contrary, been shown to supply evidence for the more moderate of the two competing theories that were discussed above.[68] The ideas of William Durant the Younger thus provide additional

67 This should, however, not lead anyone to believe that *assentire* or *consentire* could not have been used by medieval writers in place of *approbare*; they most definitely could and were. It means that the etymology of *approbare* seems better suited to denote the kind of consent that resulted from the duty to reach a verdict, rather than the right to utter a wish. It does not mean that *consentire* or *assentire* could not have served the same function.

68 See above, pp. 232–4.

grounds for a presumption against the view that by about 1300 medieval political thought had developed a concept of popular sovereignty. Due to the limited attention that has been paid to the *Tractatus* in the history of the conciliar theory, and the still more limited one {37 | 38} in that of medieval political thought in general, it may be worthwhile to discuss the relevance of his work somewhat more explicitly than would otherwise be called for.

First of all, it is necessary to stress the distorting effect exercised on the history of medieval political thought by the separation of church and state that characterizes modern history. In spite of recent achievements in recovering the political theories of medieval ecclesiastical thinkers, there continues to be a powerful prejudice working to relegate the results of such research to the history of the church alone. The separation of the history of the conciliar theory from that of the rise of medieval parliaments is only one effect of this deplorable tendency. The language used in medieval times suggests that no essential difference was perceived between ecclesiastical and secular assemblies. The same terms are frequently used for representative institutions in both of the spheres that constituted the medieval polity. They should therefore be treated at the same time.[69] Durant's proposal itself, with its balanced attention to the papacy and secular rulers, is good evidence to show that 'conciliar ideas' were no less applicable in the one than in the other. It should not be forgotten, moreover, that the bishop of Mende was also count of the Gévaudan;[70] that the city over which he ruled sent representatives to the assemblies of Philip the Fair;[71] and that some of the missives in which Philip the Fair relied on QOT were sent to the *sénéchal* of Beaucaire, the administrative district in which Mende was situated.[72]

The proper historical context for the ideas of an 'ecclesiastic' like Durant is thus not the church, but that 'republic,' both secular and ecclesiastical, of which he himself spoke. The distinction between temporal and spiritual magistrates merely reflected that between temporal and spiritual concerns, but not a separation of church and state. The two kinds of administrators were responsible for two different matters, both of which needed to be taken care of for the well-being of what was only one body politic. Provided the difference between temporal and spiritual concerns is not suppressed altogether, Durant's ideas

69 See the literature given above, nn. 50, 55.

70 See Viollet, "Guillaume Durant," and Strayer, "Noblesse du Gévaudan." Cf. Michel, *Administration royale*, and Porée, *Consulat et l'administration*.

71 See Picot, ed., *Documents*, 715–16.

72 The very first document in Picot, ed., *Documents*, 1–2, cited above, n. 28, is addressed to the *sénéchal* of Beaucaire. It explicitly asks him to ensure that, among others, the consuls of Mende would send representatives to the planned assembly.

may therefore surely be considered to be no less revealing of the history of secular than of ecclesiastical representative assemblies.

Second, and for similar reasons, it is necessary to underline that, within the medieval republic, the church played a, if not the, leading role in the development of representative institutions. The frequency with which the papacy assembled general councils in the twelfth and thirteenth centuries is a factor that is as often forgotten in the histories of parliaments as it is important for an understanding of their development.[73] Innocent III's use of QOT when convoking the Fourth Lateran Council has already been mentioned.[74] One should point out, moreover, that the same Council of Vienne that provided {38 | 39} the institutional setting for Durant's initiative was also a gathering that could hardly be paralleled by contemporary secular assemblies in its European scale and the sophisticated procedures which it employed in order to assure the proper representation of all those concerned by its proceedings.[75]

Third, William Durant the Younger was not only the nephew of one of the greatest canonists of the Middle Ages, the so-called Speculator, who preceded him as bishop of Mende, but a great canonist in his own right.[76] Where he was educated is not known, but it is generally agreed that his expertise in the canon law was hardly surpassed by any of his contemporaries, and, in the opinion of an expert in the field, rivaled only by Guido de Baysio.[77] His ideas were firmly embedded in the best available legal scholarship and they had a respectable claim on the attention of all who accepted its authority, which is to say, almost everybody.

Fourth, few documents of the time are more harshly critical of the state of the church and of secular society than Durant's *Tractatus*.[78] Among a host of moralizers who exposed the vices of their times, he stands out because of the bitterness of his analysis, his frontal assault on the papacy, barely mitigated by

73 Seven general councils from 1123 to 1311 amount to the respectable average of one every twenty-seven years.

74 See above, n. 23.

75 See E. Müller, *Vienne*, 13–26, 68–84, 92–121.

76 The standard account of the life and works of the Speculator is Falletti, "Guillaume Durand."

77 Tierney, *Foundations*, 191.

78 "Er zählt nun die nothwendigsten Reformen auf, ohne welche die Kirche immer mehr in Corruption versinken müsse; aber sie sind im Grunde gegen das ganze päpstliche System, wie es seit 200 Jahren geworden war, gerichtet." Döllinger, *Der Papst und das Concil*, 241–2. "Indeed this sprawling ill-designed work . . . strikes for the first time the authentic note of the Conciliar Movement properly so called." Tierney, *Foundations*, 196. The frequently repeated impression that Durant's work is poorly arranged is produced by errors in the early modern printed editions and thus unfounded; see above, chap. 2.

conventional expressions of reverence, and the comprehensive sweep of his precisely worded suggestions for reform. Using, perhaps even coining, a formula that was to reverberate throughout the later Middle Ages, he argued that only reform 'in head and members' could remove the cause of the ills he enumerated.[79] The passage in which he relied on QOT suggested a remedy in the form of a generalized system of councils. It was intended to limit the power of the vicar of Christ himself, a power believed to be greater than that held by any other human being—whatever the precise delimitations made between the spiritual and the temporal sphere, which were so hotly contested at exactly that time, may have been. Given such radical goals, it is not unreasonable to suppose that his interpretation of QOT was as radical as was conceivable at the time.

Here it might be objected that the church's submission to Christ's divine authority would have made it impossible for Durant to give as extensive an interpretation to QOT as those secular thinkers could whom no religious awe prevented from demanding obedience to the popular will from royalty or the magistrates of city republics. The point is surely worth being given careful attention. At the same time it seems to be debatable on at least two general grounds. On the one hand, it presupposes that very distinction between a 'spiritual' church and a 'secular' state whose misleading features were just mentioned. On the other, it begs the question, which is precisely if the interpretation given to QOT in the secular realm really was as radical as it is made out to be.

No doubt a powerful interpretive tradition may be led into battle to {39 | 40} challenge the view that the church stood at the forefront of developments generally considered to be part of the emergence of the secular state. But, just as the church was first in a number of other accomplishments, it may have been so in that of giving shape to a secular frame of mind. It was that most Catholic King Philip IV, after all, who raised the charge of heresy against Pope Boniface VIII, and it was Boniface who is reported to have compared

79 "Videretur deliberandum si posset, per quam utile fore et necessarium quod ante omnia corrigerentur et reformarentur illa que sunt in ecclesia dei corrigenda et reformanda tam in capite quam in membris." *Tractatus maior* 1.1, fol. 4^{rb}. Durant was the first to use these words according to J. T. McNeill, "Emergence of Conciliarism," 298; J. T. McNeill, "Relevance of Conciliarism," 95–6; Lecler, *Vienne*, 40; and Lecler, *Le pape ou le concile?*, 49. {In fact he was not the first; see now Frech, *Reform an Haupt und Gliedern*.} On the notion of reform in general see Ladner, *Idea of Reform*; Stump, "Reform in Head and Members"; Bäumer, ed., *Reformatio Ecclesiae*; Lytle, ed., *Reform and Authority*; Ladner, "Terms and Ideals." Additional references in Pascoe, "Jean Gerson: 'Ecclesia Primitiva'," 379n1. {See now also Stump, *Reforms*.}

fornication to the rubbing of hands.[80] At a later time, Machiavelli pointed out that the nearer the people came to Rome, the less religious were they.[81] Perhaps he should be taken more seriously than seems generally to be the case. The possibility that our notions of the relative strength of secular ideas in the temporal and the spiritual spheres may have to be reversed is thus not as far-fetched as traditional views imply.

The weight to be attributed to the case of William Durant the Younger should thus not be underestimated. Nevertheless, it alone is obviously not enough to decide the issue at stake. The most valuable result to be obtained from the preceding analysis therefore consists in that it permits the formulation of a hypothesis which is certainly suited to guide further investigations and may even prove to account more successfully for the origin of the idea of popular sovereignty.

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80 In 1303, William of Plaisians, Philip IV's counsellor, publicly charged Boniface VIII of heresy. Philip IV endorsed William's demand for a general council "ob fervorem tamen catholice fidei." Picot, ed., *Documents*, 36–7, 47–9. The possibility that Boniface was a heretic, moreover, provided the basis for Philip's appeal to a general council; see Arquillière, "L'appel au concile." The reports on Boniface VIII's views come from his opponents, but cannot therefore be simply dismissed. See, e.g., the amusing one according to which he considered fornication no worse a crime than the rubbing of hands: "Fertur dicere fornicacionem non esse peccatum, sicut nec fricacionem manuum." Picot, ed., *Documents*, 37. Particularly interesting from our present point of view is the charge, made against him in the investigations during the Council of Vienne, according to which at the time of Pope Celestine V, when he was still Cardinal Benedict Gaetani, Boniface stated that there is no divine law and insisted on the human origin of all laws, and especially of eternal punishments: "Nulla lex est divina, sed omnes leges adinventae sunt per homines, et positae sunt ibi multae poenae aeternales solum, ut homines metu poenae retrahantur a malis." Dupuy, *Histoire du différend*, 531, cited by Mundy, *Europe in the High Middle Ages* (1973), 522.

81 "La quale religione [cristiana] se ne' principi della republica cristiana si fusse mantenuta secondo che dal datore d'essa ne fu ordinato, sarebbero gli stati e le republiche cristiane più unite, più felici assai che le non sono. Né si può fare altra maggiore coniettura della declinazione d'essa, quanto è vedere come quelli populi che sono più propinqui alla Chiesa romana, capo della religione nostra, hanno meno religione. E chi considerasse i fundamenti suoi, e vedesse l'uso presente quanto è diverso da quelli, giudicherebbe essere propinquo sanza dubio o la rovina o il fragello." Machiavelli, *Discorsi* 1.12, in *Opere*, ed. Bonfantini, 127. Machiavelli is usually placed at the forefront of the emergence of secular reason. Note, therefore, his anger at the church for having strayed from the path prescribed for it by its founder, and his conviction that, had it not done so, the Christian states and republics would be "more united and happier"—a pious hope if ever there was one.

In order to develop this hypothesis it is best to focus on the reason that prevented Durant from seeing in QOT a principle of democracy. It has been found to consist of the faith that everybody, including the rulers, is required to obey norms that are already in existence. The consequences following from the presence and the absence of such a faith should now be given in more detail.

When it is present, the central business of politics will be identified with the task of interpreting existing norms. Because the question who is best qualified to do so may be answered in many different ways, many different ways can also be devised to allocate political power. It may be given to the one, the few, or the many. But these are merely variations on a single theme. In every one of these cases, the supreme authorities are limited by principles that are exempt from human control. The authority of the laws is identified with that of a transcendent God. The characteristic distinguishing the supreme political office from all others may then be defined as the right to have its decisions in fundamental questions of justice considered to be invariably correct. There is no intrinsic reason why such a right should not be referred to by the term 'sovereignty.' But one should remember that it is dependent on the duty to abide by norms independent of the will of the ruler. It must thus be carefully distinguished from the power of that sovereign whose right to rule is limited by nothing but his arbitrary will.

Under such conditions, reason, not will, is the fundamental category {40 | 41} of political discourse, and the truth, not force, the primary instrument of political success. The purpose of negotiations by parties conflicting over political issues will not be to discover what the parties want and to formulate a compromise on that basis, but rather to discover who is right and to decide accordingly. Representative institutions will not be intended to give expression to the will of the people, but to let them say what they know to be true. Whether a decision is made with or against anybody's will is irrelevant; what matters is merely whether or not it agrees with the truth. Government is considered a duty, rather than a right, and justice, not liberty, is the highest goal which it is asked to pursue.

If, on the other hand, there is no such faith in pre-existing norms, the highest office held by human beings has a different character. Those who rule can now be considered as sovereigns properly speaking. They come to acquire those divine qualities that were previously reserved to God. They are limited by nothing but their own will, and decisions emanating from their will *ipso facto* have the force of laws. Because there is no transcendent authority to which they are responsible, they can exercise their power as though they owned it. Again, the right to rule may be given to the one, the few, or the many. But, again, these are merely variations on a theme. Anyhow, the fundamental

category of politics is will, and the primary instrument of political success, force. Conflicts between contending parties can no longer be resolved by reference to the truth, but must result in a compromise. The distinction between decisions that are based on the truth and those that are not loses force. What matters is rather whether they realize the will of those who own the right to rule. Government is considered a right to have one's will obeyed under any circumstances, and liberty, not justice is the highest goal to be pursued.

This comparison should prove that the faith under consideration can be used to distinguish two different species of political thought. The question is whether or not they can be identified with any historical periods. Unless certain qualifications are made, this is obviously impossible. One wonders if any community ever really subscribed to that extreme of fatalism according to which all human conduct is totally subject to pre-existing norms. The saints who did are few and far between. Sovereigns as absolute as those characterized above, on the other hand, do not seem ever to have existed either. The so-called absolute monarchs of early modern times, who explicitly derived their right to rule from the divinity, rather appear to be a secularized kind of papacy. Those who are usually considered to be the villains in the history of political thought, because they came, or seem to have come, close to denying the existence of predetermined norms, such as Machiavelli, Hobbes, and especially Nietzsche, are still rarer than the saints. {41 | 42} Even the progress made in the twentieth century towards the establishment of governments guided by nothing but arbitrary will, whether it be that of the Führer, the party, or the people, fell short of establishing legitimacy without invoking any pre-existing norms at all—however little such norms may seem to have to do with justice in its conventional sense.

It is, in other words, not enough to distinguish merely between the presence and the absence of a faith in pre-existing norms. There are as many such faiths, as there are norms and people to believe in them. As has just been pointed out, Boniface VIII himself reputedly denied that there were any divine laws at all.[82] This may be an extreme example. But even if the charge is untrue, Boniface's accusers must have been familiar with the idea itself. Some areas of human life, moreover, will probably always be considered to be subject to purely arbitrary decisions; others are perhaps permanently exempt from them.

Notwithstanding the need for such qualifications, it does seem defensible to argue that the transition from medieval to modern political thought was made by dismissing increasing numbers of norms from the realm of immutable justice and incorporating them into that of human freedom instead.

82 See above, n. 80.

The quotations with which this essay has been prefaced are intended to point in an exemplary way to the contrast that separates the medieval from the modern way of thinking. Gratian's words express the faith that has been characterized as the basis of Durant's program.[83] As is only suitable for words of such importance, they are the first of the *Corpus iuris canonici*. They were so frequently repeated that they may be considered representative of the mainstream of medieval political thought. The quotation taken from Rousseau's *Social Contract*, on the other hand, says as clearly as could be desired that the people as a body cannot be limited by any fundamental laws; they are as free as someone making a contract with himself.[84] Here it is worth noting that, when he quoted the words of Gratian, William Durant the Younger added a revealing qualification:

> In the beginning of the *Decretum* it is written that human beings are governed by two things, namely, natural law and human conventions—that is to say, they ought to be governed by them.[85]

With this almost touching admission that perhaps the world was not governed by laws, he took his place exactly between Gratian and Rousseau, doubting the words of the former, but not ready to draw the conclusions of the latter.

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83 See above, n. 1.

84 See above, n. 2. It should be added that, as firmly as Rousseau denied that the general will could be limited by any fundamental law, as explicitly did he declare that "toute justice vient de Dieu, lui seul en est la source; mais si nous savions la recevoir de si haut nous n'aurions besoin ni de gouvernement ni de loix. Sans doute il est une justice universelle émanée de la raison seule; mais cette justice pour être admise entre nous doit être réciproque. A considérer humainement les choses, faute de sanction naturelle, les loix de la justice sont vaines parmi les hommes; elles ne font que le bien du méchant et le mal du juste, quand celui-ci les observe avec tout le monde sans que personne les observe avec lui." Rousseau, *Contrat social* 2.6, in *Œuvres complètes*, ed. Gagnebin and Raymond, 3:378. This passage nicely illustrates that at least one reason why the form of justice that Durant still regarded as a viable basis for political thought had come to be rejected was the impossibility of discovering it with sufficient certainty. When laws cannot be based on a contract with God, what else is there to do but to base them on one with oneself—or to dismiss the notion of contract altogether.

85 "Sane videretur ad correctionem et reformationem ecclesie et ad salubre regimen humani generis posse perveniri hac brevi via: scriptum namque est in principio decretorum quod regitur genus humanum duobus, id est, regi debit, videlicet iure naturali <et moribus> [P] [D. 1 d. a. c. 1]." *Tractatus maior* 1.2, fol. 4^{vb}. The words *et moribus* are added from Paris, Bibliothèque Nationale, ms. lat. 1443, fol. 2^{rb}.

Such evidence may support the claim that the hypothesis developed above has some merit. If it does, the real issue in the history of medieval and modern political thought is not whether supreme power is given to the one or the many, but rather the extent to which that power came to be seen as unimpeded by existing norms. The communal spirit of early medieval {42 | 43} societies might then be best understood as an essentially religious faith in the existence of transcendent norms, and perhaps one more extensive than that characteristic of the high Middle Ages. That, given the absence of written law and the prevalence of custom, the people should have been considered the best available source of information concerning questions of justice, is easily understood.[86] It may also be granted that the ideas of Germanic tribes conflicted with the Roman tradition that gave to a single judge the power to define justice for all and lived on in the medieval church. But to consider them democratic seems perverse—unless, of course, the modern idea of democracy itself rests on religious foundations.

Two specific factors may then be suggested to account for the origin of the idea of popular sovereignty. One is the kind of argument developed in an exemplary way by William Durant the Younger, but hardly unique to him. The procedure which it established prevented legislation without the participation of the people in that qualified sense that was discussed above.[87] The other is the waning of the faith in pre-existing norms. It was the latter that permitted the people's duty to reach a verdict to be transformed into the right to impose their will on the authorities.

There may seem to be a difficulty in arguing that popular participation in government would be continued, and even occupy a more exalted station, after precisely those grounds lost their validity on which it had originally been justified. But practices, once established, become a habit. When the reasons that brought them into existence have long been forgotten, they can still be continued and even be imbued with purposes which they never possessed before.[88]

In order to understand the origin of the idea of popular sovereignty, it would then be necessary to determine the reasons justifying a faith in the power of pre-existing norms and the motives that could have inclined medieval men to

86 An excellent description of the rationale is found in McIlwain, "Medieval Estates," 664–9. The views of O. Brunner, *Land und Herrschaft*, 133–46, are fundamental.

87 See above, pp. 233–47.

88 Nietzsche, in an interesting passage on punishment, elevates the idea that the purposes served by given practices are more variable than those practices themselves to a heuristic principle of historical analysis in general; see Nietzsche, *Genealogy of Morals*, 2.12–13, trans. Kaufmann, 76–81.

abandon it. From a general point of view, answers can easily be suggested. With respect to the former, they will most likely come from an understanding of the role of religion in primitive societies; with respect to the latter, such motives are not hard to discover. When a society gains in complexity, its members increasingly often conflict with each other. In the natural course of things a point will be reached at which given norms will no longer permit the resolution of such conflicts without hurting the interests of at least one of the parties concerned. Faith in their justice is then bound to weaken. When, moreover, a society as mature as that of Europe in the thirteenth century is subjected, as it was in the fourteenth, to the suffering caused by the exhaustion of available economic resources, prolonged war, and recurring epidemics, it may even disappear altogether. {43 | 44}

5 Conclusion

The purpose of the preceding pages has been to illustrate with a specific example the value of textual traditions for an understanding of the history of thought. In conclusion, it may be worthwhile to formulate three methodological observations of a general kind.

First, it is, from a logical point of view, purely accidental that William Durant the Younger believed in the truth of predetermined norms and also that of QOT. It is possible to hold either one of the two without the other. Their connection in his mind could thus not have been discovered by any other means than a careful reading of his text. But it is precisely their connection that defines the meaning of QOT. This may explain why, in spite of the tedium associated with it, painstaking textual analysis is both necessary and valuable for intellectual historians. There is no other means available to discover an accidental combination of heterogeneous convictions. Such combinations are the stuff of intellectual history.

Second, results derived from the study of a single text, especially if they are used as an excuse for speculations so shameless as to make it necessary to ask the reader's forgiveness, are hypothetical in nature. They must be refuted, or at least modified, if conflicting evidence demonstrates their falsehood. But that is no argument against their value. Every attempt to understand the past is hypothetical by definition, regardless how large the amount of evidence on which it is based. So long as it does not parade in the garb of established conclusions, the value of a hypothesis is therefore commensurate, not with the extent of the evidence on which it is based, but with that which it is able to organize in an intelligible pattern. Under favorable circumstances even a very limited amount

of evidence can yield hypotheses that throw a revealing light on matters far removed from the context in which they originated. The few examples from the history of political thought that could be given above without exploding the scope of this study should be sufficient to show that here such a possibility exists.

Third, the thesis that the transition from medieval to modern political thought was made by abandoning the faith in pre-existing norms can be considered from an abstract perspective. It then suggests that the development of particular intellectual phenomena is not sufficiently understood so long as one merely considers those of their predecessors out of which they were formed. It may be more instructive to study those that perished.

CHAPTER 5

At the Crossroads of Law and Politics: William Durant the Younger's 'Treatise' on Councils

Sometime between 1308 and 1311, in preparation for the Council of Vienne, William Durant the Younger (ca. 1266–1330), bishop of Mende and count of the Gévaudan in Southern France, wrote a work about the reform of the church that has become familiar under the title *Tractatus de modo generalis concilii celebrandi*.[1] The most famous demand he raised in that book was that general councils should meet every ten years.[2] As is well known, the Council of Constance more than a hundred years later enacted precisely this idea in its decree *Frequens*.[3] William Durant thus has an excellent claim on being a founding father of the conciliar movement.[4] The present article, however, is not dedicated to his role in the history of that movement, but to the genre and the unusual structure he adopted for his treatise.

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1 Following a precedent set by Gregory X's preparations for the second Council of Lyon, Pope Clement V had specifically asked for suggestions concerning the reform of the church when he announced the convocation of the Council of Vienne: "Mandavimus insuper ut iidem archiepiscopi et prelati per se vel alios viros prudentes Deum timentes et habentes pre oculis omnia, que correctionis et reformationis limam exposcunt, inquirentes subtiliter et conscribentes fideliter eadem ad ipsius concilii notitiam deferant." Clement V, *Regestum*, 3:39, nr. 3626. On the bull of convocation and its background see E. Müller, *Vienne*, 13–26, 117–18. On William Durant the Younger see Viollet, "Guillaume Durant." On his treatise, and in particular on the distinction between *Tractatus maior* and *Tractatus minor*, see above, chap. 2, with bibliographical references. The best edition is the editio princeps by Jean Crespin, *De modo generalis concilii celebrandi tractatus* (Lyon, 1531). References to the text of the treatise will indicate the number of part and chapter (or 'rubric'), add in square brackets the numbering of parts and chapters that is used in the printed editions whenever that differs from Durant's own numbering, as well as the folio and column in Crespin's edition, with superscript r and v standing for recto and verso, and a and b for the first and second column: e.g., *Tractatus maior* 2.78 [3.9], fol. 22va.

2 "Item quod [Romana ecclesia] nulla iura generalia deinceps conderet nisi vocato concilio generali, quod de decennio in decennium vocaretur." *Tractatus maior* 2.96 [3.27], fol. 59ra.

3 *Conciliorum oecumenicorum decreta*, 438–43.

4 "Indeed, this sprawling ill-designed work . . . strikes for the first time the authentic note of the Conciliar Movement properly so called." Tierney, *Foundations*, 196.

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This may seem to be a topic of purely formal, and therefore limited, interest. But such is not the case. As will appear in due course, it throws an unexpectedly bright {43 | 44} light on Durant's most basic concerns and on the place of his work in medieval history. From a more general perspective it may perhaps serve as an object lesson that, insofar as questions of form can at all be separated from questions of content, they sometimes yield particularly guileless clues to fundamental issues.

It should be noted at the outset that the early modern printed editions unwittingly confused two closely related, but separate texts, both of which were written by William Durant the Younger on the occasion of the Council of Vienne. The more important and by far the longer of the two was written before the Council of Vienne had met, whereas the other one was written while the council was in session. I have proposed to call the former *Tractatus maior* and the latter *Tractatus minor*. The present article is solely concerned with the arrangement of the *Tractatus maior* as it appears in the manuscripts.[5]

The *Tractatus maior* is divided into two parts. The first consists of four short chapters that deal in a systematic way with the legal and theoretical principles of church reform and culminate in the celebrated conciliar demand. The second part is much longer: it consists of one hundred chapters and deals with virtually every aspect of church reform that could be imagined, from details of everyday life, such as the length of women's hair, to matters of profound political importance, such as the validity of the Donation of Constantine.[6] Nonetheless there was a single conviction by which all of these topics were bound together: that the ancient law about the 'state of the universal church' conflicted with contemporary practices.[7] Durant had formed this conviction on the basis of a careful reading of the Pseudo-Isidorian collection of canon law. Nowadays this collection is famous mainly because of the forged papal

5 The most important manuscripts are Paris, Bibliothèque Nationale, ms. lat. 1443, and Munich, Staatsbibliothek, Clm 6605, fols. 1–69^{v}. For details see above, chaps. 1–2. In the past the confused state of the editions has not allowed scholars to recognize the structure of the treatise, much less to understand its function.

6 On women's hair: *Tractatus maior* 2.69, fol. 45^{vb}. On the Donation of Constantine: *Tractatus maior* 2.9, fols. 17^{vb}–18ra.

7 "... perlectis dudum cum diligentia a sanctis patribus, conciliis generalibus, provincialibus, et aliis pro statu universalis ecclesie constitutis, a quibus in pluribus est recessum, scribendum duxi ea de quibus iuxta parvitatis mee modulum agendum esse videtur in concilio memorato." *Tractatus maior*, Prologue, fol. 4$^{ra–b}$. On the 'state of the church' see Hackett, "State of the Church," and Congar, "Status ecclesiae."

decretals that it includes.[8] But at the time it was simply the most complete collection of ancient canon law. In order to highlight his reliance on that law, Durant began every chapter in the second part of his treatise by quoting one {44 | 45} of the conciliar canons contained in Pseudo-Isidore. The body of the chapter added citations of civil and canon laws that were in some fashion related to the opening canon, supporting it, elaborating upon it, or even conflicting with it.[9] The opening canons of the second part followed the same roughly chronological order in which they had appeared in the Pseudo-Isidorian collection. The second part of Durant's treatise thus amounted to a skeletal outline of that collection itself. It began with the so-called *Canones apostolorum*, dealt at length with the Council of Nicea, continued with other Greek councils, and finished with Latin councils. The treatise concluded with five chapters which systematically recapitulated the most important results and added lists of cross-references to the main body of text.[10] In this way the book could be used as a handbook of church reform in order to guide the reader to the appropriate ancient and contemporary laws, which is precisely what Durant had intended.

The points to be underlined are as follows. The book is divided into two parts. The first part deals with the guiding principles of church reform and follows a systematic order, and the second part compares ancient conciliar law with other laws and follows the chronological order of the Pseudo-Isidorian

8 Among the large body of literature see especially Fuhrmann, *Einfluss und Verbreitung*, and Richter, "Stufen pseudoisidorischer Verfälschung."

9 "Incipit secunda pars istius tractatus, in qua in speciali agitur de his que ab <antiquo fuerunt spiritus sancti instinctu> [P] ab apostolis constituta, et a sanctis patribus, et a quatuor conciliis, scilicet Niceno, Constantinopolitano, Ephesino, et Calcedonensi, que sicut sancti evangelii quatuor libros sancta ecclesia veneratur, xv. dist. sicut [D. 15 c. 2], et <xvi.> [P] dist. c. ii., iii., et iv., et sequentibus [D. 16 cc. 2–6], et ab aliis conciliis in Grecia primo et postmodum in occidentali ecclesia in diversis provinciis celebratis et a Romana et universali ecclesia ab antiquo approbatis, que <presentialiter> [P] usquequaque non servantur, quorum in presenti tractatu cum paucis concordantiis aliorum iurium sub <breviloqui> [P] memoria agitur ad hunc finem ut legamus aliqua ne negligantur, alia ne ignorentur, et alia, non ut teneantur, sed ut repudientur, sicut ait beatus Ambrosius super Lucam et in decretis, xxxvii. dist. legimus [D. 37 c. 9]." *Tractatus maior* 2, *Prefatio*, fol. 13$^{rb–va}$. The words enclosed by angle brackets are taken from Paris, Bibliothèque Nationale, ms. lat. 1443.

10 *Tractatus maior* 2.96–100. In the printed editions these chapters are dispersed. They can be found at 3.27–9, the beginning of 3.30, the end of 2.71, and 2.72. They dealt in descending hierarchical order with the Church of Rome, the prelates, the clergy, the religious orders, and the laity. For a few further complications in Durant's procedure see above, chap. 2, pp. 165–8.

collection. The question is: Can anything be said about this structure except that it is unusual and not a little complicated?

Let us take our cue from the single word of which we can say with assurance that the author himself used it in order to characterize the genre of his work: the word *tractatus*.[11] At the most basic level of classical Latin *tractatus* referred to nothing more complex than the act of physically handling something.[12] We do not need to go back that far, but we do need to go back to the Roman {45 | 46} lawyers. They used the term for a great many different purposes, but all of them can be grouped under two main acceptations. On the one hand, they used it for an activity, such as negotiations that went into the making of a contractual association in private law, or consultations that preceded the decision of a legal doubt. On the other hand, they used it for a piece of writing, a juristic dissertation on a particular legal question.[13] In both cases, whether by oral negotiations or by written analysis, *tractatus* had something to do with resolving a legal doubt. It was something to be performed by experts, men especially qualified by training or experience to analyze terms so that conflicting parties could come to terms.

The semantic field that was established by the Roman lawyers remained remarkably stable throughout the Middle Ages. To be sure, the meaning of the term was extended both metonymically and metaphorically. Since the early Middle Ages *tractatus* could be used to refer to a sermon given by a priest or a bishop, to the exegesis of a sacred text, to the counsel given by an assembly of vassals, to that assembly itself, and even to its result, such as a plan of action or a treaty.[14] But at the core of these changes the old structure can still be perceived. Even though the personnel and its preoccupations had changed, *tractatus* was still the business of experts and it still had to do with resolving doubts about matters of justice.

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11 Cf. the preface to the second part cited above, n. 9.

12 *Oxford Latin Dictionary*, 1955, s.v. 'tractatus 1.'

13 "Tractatu habito societas coita est." Dig. 17.2.32. "Communi consilio tractatuque convenire." Cod. 10.65.5. "Cum peritioribus tractatum habere." Cod. 7.14.3. "Explicito tractatu, qui ad fideicommissa singularum rerum pertinet, transeamus nunc ad interpretationem senatus consulti Trebelliani." Dig. 36.1.1. See Heumann, *Handlexikon*, 588, s.v. 'tractatus,' with thorough documentation. Berger, *Encyclopedic Dictionary*, 739, s.v. 'tractatus,' is less precise and gives no references. Cf. Post, "Romano-Canonical Maxim," 208.

14 "Collatio, praesertim de rebus sacris, praeterea concio episcopi vel sacerdotis ad populum. . . . Consilium. . . . Consilia episcoporum, in quibus de rebus ecclesiasticis tractatur, disceptatur." Du Cange, *Glossarium*, 8:143. "Argument, treatise, . . . homily, sermon, . . . commentary, . . . counsel, . . . cogitation, view, thought, . . . plan, aim, . . . discussion, deliberation, . . . meeting, synod, . . . treaty, agreement." Niermeyer, *Mediae Latinitatis Lexicon*, 1035.

One of the new meanings just mentioned is of special interest to us: this meaning of *tractatus* was the counsel given by an assembly. In the most general terms it may be said to have resulted from the confusion of private with public law that has often been remarked upon as typical of medieval times and which made it possible to extend *tractatus* from negotiations by lawyers about limited questions of private law to the deliberations of the great medieval assemblies about the common good. This is crucial for our purposes because it equipped *tractatus* with a political connotation that, as far as we can see, it had previously lacked.[15] But at the same time {46 | 47} this connotation still stood in direct continuity to the legal context in which it had originated. Let us therefore call it the political meaning of *tractatus*, but let us not forget that the politics at issue was informed by close ties to the law. Pope Innocent III's bull of convocation for the Fourth Lateran Council and King Philip IV's letter requesting an assembly of estates for April 1302 provide excellent illustrations for this usage.[16]

The second high medieval meaning of *tractatus* that is of interest for our purposes may be called the jurisprudential meaning.[17] It resulted from the revival of legal studies in the eleventh century, which eventually led to a revival of 'treatises' in the specific sense of writings by professional jurists. The usual purpose of such treatises was to ease the application of legal theory to practice.

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15 Precisely the same extension of meaning from private to public law occurred in the case of the famous principle that *quod omnes tangit ab omnibus approbari debet*. Indeed, this is a closely related case, for the words *et tractari* are often added to *approbari*; see Post, "Romano-Canonical Maxim." Cf. above, chap. 4.

16 Innocent III: "Habito super iis cum fratribus nostris et aliis viris prudentibus frequenti ac diligenti tractatu, prout tanti sollicitudo propositi exigebat, hoc tandem ad exsequendum praedicta de ipsorum consilio providimus faciendum, ut quia haec universorum fidelium communem statum respiciunt, generale concilium juxta priscam sanctorum Patrum consuetudinem convocemus." *PL* 216:824. Philip IV: "Super pluribus arduis negociis nos, statum, libertatem nostros, ac regni nostri . . . non mediocriter tangentibus, cum prelatis, baronibus et aliis nostris et ejusdem regni fidelibus et subjectis, tractare et deliberare volentes, mandamus . . . ." Picot, ed., *Documents*, 1–2. There is a difference between the two passages: the 'treatise' of which Pope Innocent III spoke was conducted prior to the council by a small group of experts, whereas the 'treatise' mentioned by King Philip was to be undertaken by the assembly itself. Furthermore in Innocent's case the object of *tractatus* was 'the common state of all the faithful,' whereas it was 'the state and the liberty of ourselves and our kingdom' in the case of Philip. But both of them used *tractatus* in the context of deliberations about the common good. Cf. Congar, "Quod omnes tangit," 215, 237–9.

17 The following remarks are largely based on Norbert Horn's essay on "Monographische Literatur" in Horn, "Legistische Literatur," 341–8.

They identified a specific topic for consideration, a *materia*, often in the form of a question arising from practical concerns, and they compiled the applicable laws from dispersed sources, adduced the relevant opinions of previous scholars, and considered concrete applications. Treatises in the jurisprudential sense, in other words, were handbooks for specific issues of legal doctrine.[18]

The development of *tractatus* in this sense proceeded slowly. To be sure, as early as the twelfth century there were a variety of texts that can be characterized {47 | 48} as *tractatus* in the jurisprudential sense. Two sections of Gratian's *Decretum*, for example, are commonly known as his 'treatises' on penance and on consecration. The slowly growing number of *ordines iudiciarii* can similarly be categorized as treatises on the law of judicial procedure.[19] One could even go so far as to call every *quaestio* of the scholastic type a 'treatise,' not only because by definition it treated a definite but doubtful issue with a definite method, but also because later treatises often treated their subject matter according to the procedure of scholastic *quaestiones*. But, as these examples themselves make clear, the genre was not well defined, and a variety of different names were used to refer to these early treatises. *Tractatus* itself was one of them, but *summula*, *libellus*, *brevis summa*, or even a simple *de* followed by an indication of the subject matter to be discussed were also used for writings on canon and civil law that were in effect treatises. Modern works of reference are therefore sometimes forced to lump all of these works together under the embarrassingly vague title of 'monographic writings.'[20] It took until about the end of the thirteenth century for treatises to become a well-established genre of legal scholarship.

There was a good reason for this delay. The basic task of the legists and the canonists of the twelfth and thirteenth centuries was to make the vast body of laws that had been inherited from antiquity accessible to students and administrators by arranging them in an intelligible order and glossing their meaning. For the time being they were less concerned with investigating particular aspects of those laws from a systematic point of view.

This had two specific effects on the form and the content of medieval treatises. First, they often dealt with conflicts between the different kinds of laws

18 See for example Cino da Pistoia in the introduction to his treatise *De successione ab intestato*: "Ex quo materia successionum, cuius notitia utilis est . . . noscitur nimium esse dispersa . . . ideo necessarium est, ut de illa materia habeatur aliquid compendiose collectum et comportatum." Cited by Horn, "Legistische Literatur," 342, 344.

19 See Fowler-Magerl, *Ordo iudiciorum*; Nörr, "Literatur," esp. 393; and Stickler, "Ordines iudiciarii."

20 See Horn, "Legistische Literatur," 341–2, and the index of Kuttner, *Repertorium*, 535, s. v. 'Traktate.'

that were in existence in medieval times and posed a difficulty for keeping legal doctrine consistent. Feudal law and statute law were therefore among their preferred subjects.[21] There were also so-called treatises on 'differences,' a category explicitly devoted to resolving conflicts between different kinds of law. Its most famous specimens dealt with the differences between Roman and canon law, such as Bartolus's *Tractatus de differentiis inter ius canonicum et ius civile*, but one also finds comparisons of Roman law with Lombard law, or of statute law with customs.

The second feature of jurisprudential treatises that derived from the lawyers' initial interest in clarifying the meaning of an inherited body of laws was that they were sometimes not systematically arranged according to the logic of the issue, but {48 | 49} rather followed the order of the legal source from which they took their guidance. This seems to have been especially true of canonistic treatises, which often displayed a distinctly mixed structure, combining a concern for the systematic treatment of a specific legal subject matter with the procedures of a gloss.[22] Such treatises continued to be written until much later. Even Bartolus, who composed a number of treatises characterized by a finely articulated structure, with divisions into main questions and sub-questions, still wrote others that borrowed their arrangement from an underlying legal source.[23]

Let it be stressed that these observations cannot claim to amount to anything even remotely resembling an exhaustive history of the semantics of *tractatus*. The foundations for such a history are lacking. Nevertheless, even though we have only pointed to a few entries in dictionaries of medieval Latin and a few specialized investigations, we have been able to ascertain at least one important characteristic of the meaning of *tractatus* in medieval times: it had a political and a jurisprudential dimension.

This is enough to support one interesting conclusion about William Durant the Younger's *Tractatus maior*: it was a treatise that echoed both of the meanings we have considered. On the one hand, it resembled a treatise in the political sense because it represented an expert's advice on issues to be considered by a general council for the sake of the common good; on the other, it resembled a treatise in the jurisprudential sense, not only because it was explicitly intended as a handbook of canon law, but also because it reflected both of the characteristic features of legal treatises that we have considered.[24] It dealt with

21 Horn, "Legistische Literatur," 344–6.

22 See Fransen, "Gloses des canonistes," 142.

23 Horn, "Legistische Literatur," 342–3, 346–7.

24 As has been pointed out above, n. 1, it was written in direct response to Pope Clement V's request for suggestions about the reform of the church that was included in the bull of

a 'difference,' namely the difference between the ancient conciliar and the contemporary papal law of the church, and it tried to combine the order of the source on which it was based, the Pseudo-Isidorian collection, with a systematic study of church reform.

At the same time, however, the *Tractatus maior* differed in important respects from both of these two meanings. As far as the political meaning is concerned, it {49 | 50} was intended as a basis for the council's deliberation, but it did not reflect those deliberations themselves. As far as the jurisprudential meaning is concerned, it limited itself exclusively to the text of the laws and did not engage the legal scholarship that played such an important part for ordinary legal treatises.[25] Equally important, it refused to resolve the legal

convocation for the Council of Vienne. The terms of that bull were similar to those that had been used by Innocent III: "Nos cum eisdem fratribus nostris aliisque viris prudentibus exacto ac frequenti tractatu prehabito, prout tante necessitatis instantia exigebat, de ipsorum fratrum consilio universale concilium, sicut imitatione digna sanctorum patrum consuetudo laudabilis longeve observationis exemplo nos instruit, a proximis kalendis octobris ad duos annos immediate sequentes decrevimus congregandum." Clement V, *Regestum*, 3:390, nr. 3626. Note that Clement avoids mentioning both *status ecclesie*, of which Durant was going to speak, and *universorum fidelium communem statum*, of which Innocent III had spoken.

25 Durant referred to the law on more than two thousand occasions, but only about a dozen times to the ordinary gloss on the *Decretum*, twice to Innocent IV, and four times to Hostiensis. He was convinced that too little attention was being paid to the laws and too much to the secondary legal literature. He expressed his views on the damage done by this practice quite forcefully: "Item cum nimia prolixitas et etiam similitudo confusionem inducant, sicut habetur prohemio decretalium et ut alibi scribitur: ars longa, vita brevis, et experimentum difficile et diversitas interpretantium frequenter confusionem <et> [P] materiam litium et discordiarum inducunt, videretur utile quod de qualibet facultate sumerentur literati et experti viri et arbitri, ad quorum iudicium per summum pontificem omnes probabiles dubitationes circa quaslibet scientias exorte, resecatis omnibus similibus et superfluis, remanentibus tamen ipsarum scientiarum textibus originalibus, tollerentur." *Tractatus maior* 2.73, fol. 53^{ra-b}. In *Tractatus minor* 22 [3.45], fol. 68^{vb}, Durant was even more outspoken: "Quod diversitas glossarum et scriptorum que est in singulis facultatibus, que diversitas et varietas cum multiplicitate et prolixitate ac similitudine dictorum et recitatorum studentium sensus ebetat, tempus et facultates consumit, confusionem et ignorantiam inducit, cum ex hoc textuum et originalium notitia contemnatur, reduceretur per certos magistros in qualibet facultate approbatos et deputatos, resecatis superfluis, similibus, et contrariis, ad compendium veritatis, quod compendium approbaretur per apostolicam sedem." I am grateful to Kenneth Pennington for pointing out that similarly disparaging remarks are commonly found in prologues to works that were meant to abbreviate or summarize the law. Durant's observations were unusual

doubts that it raised. On the contrary, it tended to magnify the conflicts between the law of the ancient church and the practices of the contemporary papacy.

These differences resulted from the specific purpose for which Durant had written his treatise. At one and the same time it was a piece of academic jurisprudence and a piece of political advice. The first, 'political' part argued that only general councils were really capable of supervising the laws and maintaining their consistency. In this sense it furnished the premise for Durant's decision in the second part to pay attention to 'the original texts' and the doubts they raised about the state of contemporary law in order to submit them to conciliar deliberation. The second, 'jurisprudential' part, on the other hand, established as a matter of fact that the laws had lost their consistency. In this sense it furnished the premise for the conclusion that general councils ought to play a more active part in governing the church, which had been defended in the first part. The two parts were thus intimately and reciprocally related to each other. But they were also essentially incomplete. They were intended as the written beginning of a single process that was to continue with the unwritten deliberations of the Council of Vienne and to end with its written decisions. {50 | 51}

When the structure of the *Tractatus maior* is considered from this point of view, it turns out to have been a rather subtle affair.[26] It was designed to convey a single message: jurisprudence remains unfinished without councils, and councils are unfounded without jurisprudence. It tried to maintain a kind of *tractatus* that linked political deliberations to the study of written legal sources. It tried to let the laws speak through councils. It was thus squarely founded on that well-known medieval conception of 'authority' that is virtually synonymous with the authority of written texts and made it easier to treat political power and legal justice under a single heading than it has become in modern times.[27]

There is an obvious reason why Durant should have striven with such might to maintain exactly this conception of authority at exactly this time. Nominalists were beginning to insist on the difference between words and things, political theorists were beginning to distinguish between ordained power and absolute power, and lawyers were beginning to become preoccupied with the

because they accompanied a demand for a revision of the legal literature by university experts with papal authorization, that is to say, a demand for systematic codification.

26 Viollet, "Guillaume Durant," 82, thought differently: "Dans son ensemble, l'oeuvre est confuse et hâtive; ce sont, pourrait-on dire, des notes jetées comme en courant."

27 See Kuttner, "On 'Auctoritas'."

differences between natural and positive law. It was the time when the body of classical canon law was virtually complete, when the outlines of the modern state can for the first time be clearly perceived, and when the Renaissance was about to begin. In short, jurisprudence was in fact beginning to be divorced from politics, and the authority of written texts was beginning to give way to a new conception of sovereignty.

These are very broad developments, which took a long time to mature and which we cannot pursue any further. Let us note, however, that they had a noticeable impact on the word *tractatus*. At the councils of the high Middle Ages it had been possible to treat of the common good in terms that were at once legal and political. There is hardly any better illustration for this kind of 'treatise' than the decrees of the Fourth Lateran Council, which began with a definition of the Christian faith, continued with detailed regulations for the conduct of clergy and laity, and concluded with plans for the crusade. This kind of *tractatus* came to an end with the Council of Vienne, the last in the great series of the high medieval general councils that met on an average of about one every thirty years. Obviously this is not to say that there were no councils thereafter. Although it did take more than a hundred years for the next council to meet at Constance, the conciliar movement produced a veritable flurry of councils that considered themselves to be very much in agreement with Durant's ideas. At the same time it is probably fair to assert that, on the basis of experiences gathered during the period of Avignon and the Great Schism, those councils no longer shared his faith in the conjunction of law with politics. *Tractatus* began to lose its suitability for political speech. It had been too closely associated {51 | 52} with the law to maintain its utility for a kind of politics that increasingly relied on principles of a different kind. As far as I can see there is only one area where the political meaning of *tractatus* has survived into contemporary times, and that, significantly, is international law, an area the state has not yet quite managed to cover because there are many states competing for it, and which is therefore still exempt from sovereignty. There we can still speak of 'treaties,' a word that is directly descended from *tractatus* and that still evokes the medieval combination of politics with law.

Legal treatises, on the other hand, far from passing away, flourished in the fourteenth century and thereafter. They were being published in increasing numbers and with ever more carefully elaborated procedures. Treatises 'On the power of the pope' even appeared with such alarming frequency as to justify their being regarded as a genre of their own.[28] But these treatises, much

28 See Miethke, "Traktate 'De potestate papae'." Cf. Schulte, *Geschichte*, 2:479.

though they had to do with law, had much less to do with politics than Durant had intended. They were the products of academic specialization.

From hindsight Durant can thus be seen to have failed in what I believe was his most basic endeavor. Perhaps the bipartite structure of his own treatise suggests that, in spite of his hope to keep authority intact by keeping law united with politics, he unwittingly contributed to the very distinction between them. But that is a matter of conjecture. Certain is that the *Tractatus maior* did not escape the disintegration of 'authority.' Even while its fame was growing at the councils of Constance and Basel, one scribe renamed it *Liber de modo generalis concilii celebrandi*, a title that clearly expresses a taste for pure conciliar theory in a more abstract sense than Durant would have liked.[29] Two other scribes mercilessly lopped off the second part and copied only the first, surely because in their eyes the rest was outdated, 'merely' practical and not sufficiently 'theoretical.'[30] To be sure, the treatise was still able to attract the attention of reformers at the Council of Trent in the sixteenth century and of French Gallicans in the seventeenth.[31] But it {52 | 53} was also beginning to be sheltered in vast collections of treatises on all sorts of legal questions where we may be sure that it provided food for specialist thought while being increasingly removed from the actual business of politics.[32] Here we are already well underway towards that growing freedom to engage in theoretical discourse

29 See above, pp. 146–7, 150–1.

30 Vatican Library, ms. Ottob. lat. 823, and Zurich, Zentralbibliothek, ms. S 204 o. Consider also the embarrassment about Durant's choice of topics that his editor Jean Crespin expressed in his preface: "Nonnulla fortasse ab huius aetatis institutionibus videbuntur aliena. Quae reliquimus integra quoniam authoris ea sententia fuit, quam supprimere iniquum prorsus visum est." *De modo generalis concilii celebrandi tractatus*, ed. Crespin, fol. 2ra.

31 Regarding the Council of Trent: Cardinal Guglielmo Sirleto owned what is now Vatican Library, ms. Ottob. lat. 823; see above, pp. 137–40; and Philippe Le Preux published his edition of the treatise in Paris in 1545 on the occasion of the convocation of the Council of Trent; see above, p. 148. Concerning the Gallican tradition: Louis Pinelle, chancellor of the University of Paris and bishop of Meaux, who is best known as a precursor of Guillaume Briçonnet and his reforming circle in the early sixteenth century, owned what is now Paris, Bibliothèque Mazarine, ms. 1687; see above, pp. 126–9; cf. Veissière, "Précurseur de Guillaume Briçonnet," 81–2; Pierre Pithou owned what is now Troyes, Bibliothèque Municipale, ms. 786; see above, pp. 129–32; and Bossuet still referred to the treatise in his *Défense de la Déclaration*, 1:63; cf. Viollet, "Guillaume Durant," 123–4. As late as 1671 the treatise was printed one last time by François Clousier in Paris.

32 See *Tractatus ex variis iuris interpretibus collecti,* 2:88^{v}–117^{v}, and *Tractatus universi iuris*, 13/1:154–82^{v}.

without being encumbered by political considerations that was directly opposed to Durant's intentions and that has contributed to the wonderfully weightless definition of 'treatise' prevailing in our own century: 'literary composition dealing more or less formally or systematically with definite subject.'[33]

33 *Concise Oxford Dictionary*, 7th ed., 1142.

CHAPTER 6

The Reception of William Durant the Younger's Treatises in Late Medieval and Early Modern Times

1 Introduction

William Durant the Younger was born in about 1266 in Puimisson near Béziers in Southern France and served as bishop of Mende and count of Gévaudan, an extended territory in the south of the Massif Central, from 1296 until his death in 1330.[1] He is not {61 | 62} to be confused with William Durant the Elder, his

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This essay is an expanded version of a paper I gave in Munich at a colloquium on the reception of political thought in the later Middle Ages organized by Jürgen Miethke. I would like to thank Jürgen Miethke cordially for his invitation to present my work on the reception of William Durant the Younger's ideas to the colloquium. I would similarly like to thank the participants for their valuable suggestions and observations.

1 The best edition of Durant's treatise was published by Jean Crespin in Lyon, 1531, under the title *De modo generalis concilii celebrandi tractatus*. In references to the text of this edition I will distinguish between *Tractatus maior*, that is, the treatise Durant submitted to the Council of Vienne, and *Tractatus minor*, that is, the treatise Durant wrote at the Council of Vienne, most likely in response to the opposition he encountered. I will quote the number of part and/or chapter as they appear in Durant's original version, followed by the number of part and chapter in the printed edition in square brackets whenever the numbering in the printed edition differs from Durant's version. I will also identify the folio and column in Crespin's edition, with superscript r and v standing for recto and verso, and a and b for the first and second columns, e.g., *Tractatus maior* 2.78 [3.9], fol. 22va. On abbreviations in references to legal texts see Kuttner, "Notes on the Roman Meeting"; Ochoa and Diez, eds. *Indices canonum*, i–v; and Brundage, "Appendix I." For all questions concerning the text of Durant's treatise—in particular the differences between the original version and the printed editions, the distinction between *Tractatus maior* and *Tractatus minor*, the organization of both treatises, and the nature, origin, and stemma of manuscripts and printed editions—see above, chaps. 1–2, and Fasolt, *Council and Hierarchy*. On Durant's life and work see Viollet, "Guillaume Durant," Tierney, *Foundations*, 190–9, Sieben, *Konzilsidee*, 317–21, 351–7, and Fasolt, *Council and Hierarchy*. For additional references to the secondary literature see above, chap. 3. There is a question about the correct spelling of Durant's name. The literature wavers

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uncle, namesake, and predecessor as bishop of Mende, the author of works as famous as the *Speculum judiciale* and the *Rationale divinorum officiorum*.[2]

The younger Durant is best known for a great treatise on the reform of the church that he submitted to the Council of Vienne 1311–12. In this treatise he demanded that in the future general councils ought to be assembled every ten years, and that the pope ought not to be allowed to pass new laws without the participation of such councils.[3] In so doing he anticipated the main provisions of the Council of Constance's decrees *Haec sancta* and *Frequens* by more than a hundred years and earned himself a well-deserved reputation among historians as a precursor of the conciliar movement. Yet he did not only demand a new role for general councils in the constitution of the church, but also made an immense number of other recommendations, some of them significant, some less so, some widely echoed, others specific to him, all of them meant to lead to a *reformatio in capite et membris*—a concept he seems to have been the first to use in public[4]—but in very different ways.

To mention only a few examples: in addition to criticisms of pluralism, nepotism, and absenteeism that were little short of commonplace, Durant demanded that a tenth of the income from all prebends held by secular and regular clergy should be set aside in order to support the studies of poor students;[5] that priestly celibacy ought to be abolished;[6] that the finances of the papacy should be thoroughly overhauled, but only on condition that the pope declared himself willing to exercise his *plenitudo potestatis* according to the wishes of the council;[7] that the church ought to stop temporal lords from

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between Durant, Durand, Durandus, Durantis, Durandis, Duranti, und Durandi. R. Heckel, "Eine Kanzleianweisung," 110n4, establishes 'Duranti' as the correct form. (I am grateful to Reinhard Elze for pointing me to this article, which is regularly overlooked and has been overlooked by me as well.) Nonetheless I follow Viollet, "Guillaume Durant," 2n2, who was well informed about the advantages of 'Duranti,' in his preference for the modernizing form 'Durant.'

2 See Falletti, "Guillaume Durand." The correct title is *Speculum iuris*. I use *Speculum judiciale* because that is the title given to the work in the early modern printed editions I have used.

3 "Item quod [Romana ecclesia] nulla iura generalia deinceps conderet nisi vocato concilio generali, quod de decennio in decennium vocaretur." *Tractatus maior* 2.96 [3.27], fol. 59ra.

4 Thus J. T. McNeill, "Emergence of Conciliarism," 298–9, and Lecler, *Pape ou concile*, 49. Gert Melville, however, points out to me that among the Cluniacensians the concept of *reformatio in capite et membris* had already occurred much earlier. Cf. Frech, *Reform an Haupt und Gliedern*.

5 *Tractatus maior* 2.38, fol. 32va.

6 *Tractatus maior* 2.46, fol. 35va.

7 "Item quod de bonis ecclesiasticarum personarum superabundantibus talis provisio fieret supradicte Romane ecclesie quod absque omni taxationis nota et infamia posset communiter

debasing the coinage;[8] that radical cuts ought to be made in the scholarly literature in every faculty, since much of it was superfluous and too expensive for students, and that it should be replaced with concise handbooks and binding decisions {62 | 63} by the papacy on disputed legal issues;[9] that newfangled motets ought to be prohibited;[10] that the papacy ought to leave jurisdiction over local disputes to provincial councils;[11] that theological studies ought to be focused on the Bible and *vera theologia*;[12] that exemptions ought to be abolished;[13] that impoverished bishoprics ought to be merged with other bishoprics;[14] and so on.

2 The Character of the *Tractatus maior*

Durant's treatise thus differs in several respects from the writings to which this colloquium is primarily devoted. It is an occasional piece of writing on

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et divisim honorabiliter vivere <et> [M] onera incumbentia supportare, proviso tamen quod ultra et contra predicta et alia que concilio rationabilia viderentur contra divinas et humanas leges non posset absque generali concilio habenas extendere plenitudinis potestatis." *Tractatus maior* 2.96 [3.27] fol. 59^{rb}. The emendation is taken from Munich, Bayerische Staatsbibliothek, Clm 6605, fol. 56ra.

8 *Tractatus maior* 2.93 [3.24], fol. 57va.

9 "Item cum nimia prolixitas et etiam similitudo confusionem inducant, sicut habetur prohemio decretalium, et ut alibi scribitur: ars longa, vita brevis, et experimentum difficile et diversitas interpretantium frequenter confusionem <et> [P] materiam litium et discordiarum inducunt, videretur utile quod de qualibet facultate sumerentur literati et experti viri et arbitri, ad quorum iudicium per summum pontificem omnes probabiles dubitationes circa quaslibet scientias exorte, resecatis omnibus similibus et superfluis, remanentibus tamen ipsarum scientiarum textibus originalibus, tollerentur." *Tractatus maior* 2.73 [3.4], fol. 53$^{ra–b}$. The emendation is taken from Paris, Bibliothèque Nationale, ms. lat. 1443, fol. 79^{vb}. Durant's critique is chiefly directed against glossators and commentators, as is confirmed by the parallel in *Tractatus minor* 22 [3.45], fol. 68^{vb}: "Quod diversitas glossarum et scriptorum que est in singulis facultatibus, que diversitas et varietas cum multiplicitate et prolixitate ac similitudine dictorum et recitatorum studentium sensus ebetat, tempus et facultates consumit, confusionem et ignorantiam inducit, cum ex hoc textuum et originalium notitia contemnatur, reduceretur per certos magistros in qualibet facultate approbatos et deputatos, resecatis superfluis, similibus, et contrariis, ad compendium veritatis, quod compendium approbaretur per apostolicam sedem."

10 *Tractatus maior* 2.68, fol. 45^{rb}; *Tractatus maior* 2.75 [3.6], fol. 53$^{va–b}$.

11 *Tractatus maior* 2.11, fol. 18$^{rb–va}$; *Tractatus maior* 2.32, fol. 28va.

12 *Tractatus maior* 2.85 [3.16], fol. 55^{vb}.

13 *Tractatus maior* 1.4, *Rubrica de exemptionibus*, fols. 8^{rb}–13^{rb}.

14 *Tractatus maior* 2.7, fol. 17va; *Tractatus maior* 2.91 [3.22], fol. 56$^{va–b}$.

the reform of the church. By no means does it deal systematically with anything that could be called political theory. That does not mean that Durant did not make statements of considerable significance for understanding the political thinking of his time. Nor does it mean that he was a monarchist or anti-Aristotelian—the opposite seems closer to the truth. But it does mean that he was concerned to give effect to an understanding of order that was based on law and not at all designed to support the autonomy of politics, neither in political theory nor in political practice. Instead, Durant insisted on the subordination of every exercise of power to law and had accordingly little sympathy for the study of politics as a subject in its own right. Similarly he considered it to be reasonably self-evident that all temporal power was subject to the church, not at all because he doubted the existence of separate temporal institutions in and of themselves, but because the church exercised divine law, that is, a higher form of law binding both state and church to the same degree.[15] He located the foundations of this {63 | 64} understanding of order in, on the

15 On the one hand, Durant therefore insisted solemnly on the respect that was owed to the king and on the obligation of the clergy to observe their fealty to him, frequently referring to Visigothic texts; see *Tractatus maior* 2.6, fol. 16^{rb}, and *Tractatus maior* 2.71 (in the printed editions this chapter is broken into pieces that can be found at the beginning of chapter 2.71, in the middle of 3.30, and towards the end of 3.1, fols. 49^{rb}–51va, 60va–61^{rb}, and 52$^{rb–vb}$, in that order). On the other hand, he insisted energetically on the supremacy of the church and quoted the relevant classic texts, from the Donation of Constantine (D. 96 cc. 13–14), via Pope Nicholas II's canon *Omnes* (D. 22 c. 1), Innocent III's canons *Solite* (X 1.33.6) and *Novit* (X 2.1.13, the famous foundation for ecclesiastical interference in temporal affairs *ratione peccati*), down to Pope Nicholas III's *Fundamenta militantis ecclesie* (VI 1.6.17); see *Tractatus maior* 2.9, fols. 17^{vb}–18ra; 2.93 [3.24], fols. 57va–58ra. Durant thus maintained a thoroughly characteristic combination of a dualism of temporal and spiritual powers with a monistic conception of order that entailed the supremacy of the church: "Videretur ideo utile, si absque scandalo fieri posset, hec taliter secularium principum auribus inculcari quod cognoscerent nullam sibi fieri iniuriam cum ecclesia se de aliquibus casibus secularibus intromittat, et quod distinguerentur iura ecclesiastica et secularia, cum hoc videatur consonum iuri, x. di. quoniam, xcvi. di. cum ad verum, et ca. duobus." *Tractatus maior* 2.9, fol. 18ra; cf. D. 10 c. 8, D. 96 c. 6, D. 96 c. 10. It is telling that precisely this combination of dualism and monism is particularly clearly expressed in his decisive demand for general councils, where he speaks of a single *res publica* embracing both temporal and spiritual powers and treats pope and kings exactly the same: "Videretur esse salubre consilium pro re publica et pro dictis administratoribus rei publice quod sic sub ratione, ut premissum est in rubricis proximis, limitaretur potestas eorundem quod absque certo consilio dominorum cardinalium dominus papa, et reges ac principes absque aliorum proborum consilio, sicut hactenus in re publica servabatur, non uterentur prerogativa huiusmodi potestatis, potissime aliquid concedendo contra concilia et contra iura approbata communiter, et quod contra dicta concilia et iura nihil possent de novo statuere vel concedere nisi generali concilio convocato, cum illud quod omnes tangit

one hand, the well-known canon of Pope Gelasius on the two powers (which, by the way, he intentionally misquoted in order to give it a meaning favorable to the king, thereby countering, as it were, Pope Gregory VII, who had quoted the same canon with an omission that was equally misleading, but designed to give it a meaning favorable to the papacy),[16] and, on the other hand, in the thirteenth chapter of Paul's letter to the Romans, which in Durant's judgment required all powers to subject themselves entirely {64 | 65} to the law, not although, but because they were ordained by God.[17]

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secundum iuris utriusque regulam ab omnibus debeat communiter approbari." *Tractatus maior* 1.4, fol. 7^{rb}.

16 In Gratian's *Decretum*, D. 96 c. 10, Gelasius's text runs as follows: "Duo sunt quippe, inperator auguste, quibus principaliter hic mundus regitur: auctoritas sacra pontificum, et regalis potestas. In quibus tanto gravius est pondus sacerdotum, quanto etiam pro ipsis regibus hominum in divino sunt reddituri examine rationem." Gratian's version relied on Pope Gregory VII's omission of the significant restriction that Gelasius had added to his declaration of priestly superiority in writing to Emperor Anastasius: "Si enim quantum ad ordinem pertinet publicae disciplinae, cognoscentes imperium tibi superna dispositione collatum, legibus tuis ipsi quoque parent religionis antistites, ne vel in rebus mundanis exclusae videantur obviare sententiae; quo, oro te, decet affectu eis obedire, qui praerogandis venerabilibus sunt attributi mysteriis?" Cf. Miethke and Bühler, *Kaiser und Papst*, 20–1, 63, with Carlyle, *History*, 1:191n1. Durant, by contrast, wrote in *Tractatus maior* 1.2, fol. 4^{vb}: "Si itaque duo a quibus regitur humanum genus sicut a ministris dei, videlicet ecclesiastica autoritas et regalis potestas, sicut Gelasius papa scribit Anastasio imperatori, xcvi. distinctione, duo sunt, vellent intendere ad dictam reformationem et salubre regimen humani generis, ..." He thus replaced *principaliter* with *sicut a ministris dei* and *auctoritas sacra pontificum* with *ecclesiastica autoritas* and omitted the rest, a pretty clear dig at *Unam sanctam*. Similarly to Durant, John of Paris, *De regia potestate* 10, ed. Bleienstein, 110–11, 113, wrote: "Sic sunt distinctae [spiritualis potestas et secularis] quod una in aliam non reducitur, sed sicut spiritualis immediate a Deo, ita et temporalis. . . . Dicit enim Apostolus Ad Romanos xiii (4–6) de rege et principe: 'Si malefeceris, time! Non enim sine causa gladium portat. Dei enim minister est, vindex malorum in ira' etc. Et infra: 'Ideo praestatis tributa. Ministri enim Dei sunt.' Non dicit 'papae' sed 'Dei'!" It is telling that in *Tractatus minor* 8 [3.31], fol. 61^{vb}, Durant refrained from changing the text to suit his purposes: "Duo a quibus secundum Gelasium papam principaliter hic mundus regitur, videlicet auctoritas sacra pontificum et regalis potestas . . . ."

17 "Quod dominus papa et reges debeant servare premissa in lege et in evangelio, conciliis, et iuribus approbatis contenta, de facili potest ostendi. Nam potestas eorum a deo est et que ab eis ordinata sunt a deo ordinata existunt sicut ait Apostolus ad Romanos xiii., xi. q. iii. qui resistit, et c. imperatores, x. di. quoniam idem mediator, xcvi. di. cum ad verum, xxiii. q. iiii. quesitum. Ordo autem melior non potest esse in regimine eorundem quam quod in eorum regimine deo, a quo eorum processit potestas et cuius regimini debet conformari regimen orbis, lxxxix. di. ad hoc, xvi. q. i. ad hoc, inquantum possunt sunt conformes." *Tractatus maior* 1.3, fol. 5ra. Cf. C. 11 q. 3 cc. 97–8, D. 10 c. 8, D. 96 c. 6, C. 23 q. 4 c. 45, D. 89 c. 7, C. 16 q. 1 c. 63.

This understanding of order was so broadly conceived that it allowed Durant to take positions without much ado that, from a modern point of view, seem to be irreconcilably opposed to each other. The 'conciliarist' Durant had no trouble, for example, not merely to mention the 'papalist' treatise *De ecclesiastica potestate* by his archbishop, Giles of Rome, on two separate occasions, but to recommend it emphatically to his readers as an unsurpassed account of the relationship between spiritual and temporal power.[18] It does not follow that Durant was incapable of recognizing that his 'conciliar' theory was impossible to reconcile with Giles's 'papal' theory.[19] What follows rather is that he regarded the evidently increasing tensions between the secular clergy and the papacy, as well as those between temporal and spiritual powers, as a mortal danger for the church. Quite like Gregory VII and Giles of Rome he was convinced that the freedom of the church depended on its unity—except that he held the papacy responsible for the lack of such unity. {65 | 66} The purpose of his program was to put an end to the conflict between the different parties competing with each other in the church by reforming the church in head and members. This purpose cannot be captured by concepts such as 'conciliar' and 'papal,' which

18 "De potestate ecclesiastica super temporales dominos et dominia temporalia. Istam rubricam non prosequor nec etiam lxxii. de presenti propter librum quem de contentis in dictis duabus rubricis reverendus in Christo frater Egidius Bituricensis archiepiscopus, in quo profunditas et sublimitas vigent scientie, copiose et utiliter edidit, in quo plenius videri possunt pertinentia ad istas duas rubricas quam posset hic explicari." *Tractatus maior* 2.95 [3.26], fol. 58$^{rb–va}$. Cf. the parallel in *Tractatus maior* 2.72 [3.3], fols. 52^{vb}–53ra. Posch, "Reformvorschläge," 289–90, and E. Müller, *Vienne*, 596n40, were evidently wrong to interpret this as a reference to Giles of Rome, *De regimine principum*.

19 Just as it does not follow that the 'papalist' Giles ought to have refrained from fighting against papal exemptions side-by-side with William Durant the Younger, as he had been doing since the 1280s; cf. E. Müller, *Vienne*, 495–6; Congar, "Aspects ecclésiologiques," 141–2; Douie, *Conflict*, 28 and n. 3; Gratien, *Histoire*, 349; and in particular the following passage from Giles's *Tractatus contra exemptos* 3 (1555), fol. 23^{v}, quoted from Congar, "Aspects ecclésiologiques," 142n358: "Summus Pontifex intelligitur ordinarius ubique et posse ad se reservare ordinariam et immediatam cognitionem cujuslibet Ecclesiae. Hoc tamen non obstante quilibet praelatus in dioecesi habet cognoscere causas illius dioecesis, et est ordinarius in tota sua dioecesi: quod ideo contingit quia praelati sunt assumpti in partem sollicitudinis; sed Summus Pontifex assumptus est in totalem plenitudinem potestatis. Et quia totum stat simul cum parte, ideo simul stat immediata jurisdictio, etiam ordinaria, Summi Pontificis, cum ordinaria jurisdictione cujuscumque praelati. Et quia exemptio hoc tollit, et privat jurisdictionem mediam praelatorum, ideo quaedam inordinatio dici potest: quia facit de jure praelatorum non jus." That was Durant's opinion, too.

presuppose and thereby implicitly confirm the very polarization that Durant was struggling hard to prevent.[20]

3 Obstacles to Tracing the Reception of the *Tractatus maior*

The preceding observations are sufficient to point to the main obstacle in the way of anyone who would like to study the reception of Durant's treatise: his conceptual foundation is so broad and the proposals he makes on that foundation are so comprehensive and variegated that virtually no episode in the history of church reform in the later Middle Ages and early modern times does not suggest possibilities for some kind of connection to Durant. The conciliarists at Constance who adopted his ten-year period for general councils in the decree *Frequens*, the Protestants who abolished priestly celibacy, but also the fathers at Trent who instituted seminars for the training of priests were all taking measures to whose propagation Durant can claim to have made a significant contribution. Yet his treatise was only a piece of occasional writing and does not belong to any of the established traditions of intellectual transmission that constitute the subject of this colloquium. It is neither the work of any particular school of thought nor one representing the interests of any particular profession. That makes it correspondingly difficult to trace the paths on which it was received.

The difficulty is made considerably greater by the method Durant used to express himself in his treatise. He tried to clothe his thoughts as much as possible in the words of canon law, and he did so with great success: sentences written entirely by himself are relatively rare. What predominates is such an overwhelming mass of citations from spiritual and temporal law, particularly the collection of Pseudo-Isidore, Gratian's *Decretum*, and the *Liber extra*, that his book may be called a veritable canonistic cento.[21] Now it is true that in his

20 In my opinion 'episcopalism' does not lead much further, because it captures only a part of the whole to which Durant referred as *salubre regimen humani generis*, *res publica*, *monarchia*, or, following Pope Gregory I and D. 89 c. 7, *magnus ordo differentie*.

21 The *Tractatus maior* contains more than two thousand quotations. About half of them come from Gratian's *Decretum*. The rest come, with decreasing frequency, from the collection of Pseudo-Isidore, the *Liber extra*, the Bible, the *Corpus iuris civilis*, and the *Liber sextus*. The frequency with which Durant referred to these sources by itself does of course not permit unequivocal conclusions about the significance he attributed to them. Durant placed very great stress on a very few canons passed by the councils of antiquity. Similarly, in *Tractatus maior* 1.3, *Rubrica de limitanda potestate superiorum*, fols. 5^{vb}–6^{vb}, one can find quotations from Augustine, *De civitate dei*, Valerius Maximus, *Facta et dicta*

choice of passages to quote he demonstrated as much expertise in the law as originality in its deployment.[22] It is therefore quite conceivable that the importance of his work rests first and foremost on the {66 | 67} manner in which he may not only have influenced the uses of this or that particular canon by giving it a meaning suitable to his cause, but also changed, deepened, and historicized the understanding of the law of the church as a whole. But it is in the very nature of this kind of influence that it is difficult to demonstrate.

It may, for example, very well be the case that it was Durant who convinced one or another person to invoke the canon *De quibus causis* or the Visigothic councils of antiquity in order to support an increased role for councils in the church. But such a person would then of course refer to *De quibus causis* and the Visigothic councils themselves, and hardly to Durant. That makes it next to impossible to determine if Durant played any part in prompting such references.[23] Again, it may very well be the case that there is a direct line from Durant's attempt to unhinge papal decretal law with the historical help of the Pseudo-Isidorian conciliar canons to Lorenzo Valla's demonstration that the Pseudo-Isidorian papal letters were forged. Yet how such a line could be empirically traced in the sources is entirely unclear to me.

Sometimes one does of course strike lucky. Nicholas of Cusa, for example, quotes Pseudo-Anacletus's canon *In novo testamento* (D. 21 c. 2) and Cyprian's canon *Loquitur Dominus ad Petrum* (C. 24 q. 1 c. 18), in his *Concordantia Catholica* in order to prove that the power Peter received from Christ was no greater than the power received by the other apostles.[24] These canons were widely known and frequently cited.[25] Nonetheless his editor Gerhard Kallen is

memorabilia, Cicero, *De officiis*, and in a single previously unrecognized instance John of Salisbury, *Policraticus* 4.11, that are short in their extent, but whose substance is decisive for understanding Durant's train of thought.

22 Thus judges Tierney, *Foundations*, 191: "Guilielmus Durantis displayed a familiarity with Decretist literature exceeding that of any contemporary except Guido de Baysio, and an ingenuity in marshalling the Decretist texts in support of his own views that was quite unparalleled."

23 In *Tractatus maior* 1.4, fol.7^{rb}, Durant quotes *De quibus causis* (D. 20 c. 3), along with D. 21 c. 2, X 1.29.21, Cod. 6.42.32.1, and Cod. 7.14.3, as the most important justification of his demand for general councils. Concerning his positive attitude towards the Visigothic councils see especially *Tractatus maior* 2.11, fols. 18^{rb}–21ra, and *Tractatus maior* 2.71 [2.71, 3.30, 3.1], fols. 49^{rb}–51va, 60va–61^{rb}, 52$^{rb–vb}$.

24 Nicholas of Cusa, *Concordantia Catholica* 2.13, ed. Gerhard Kallen, 150 and n. 8.

25 Since the eleventh century D. 21 c. 2, a canon in which bishops are characterized as successors of the apostles, and priests as successors of the disciples, had figured prominently among the most frequently cited passages from the Pseudo-Isidorean decretals that made it into Gratian's *Decretum*. Ever since the great battle between the secular clergy and the

entirely right to refer in a corresponding footnote to Durant's treatise as Nicholas's source, for in the first place both of these canons did in fact play a decisive role in the arguments with which Durant opposed the papacy, and in the second place we know that Nicholas owned a manuscript of Durant's treatise that he did not only read carefully enough to complain about the poor work of the copyist, but in which he also {67 | 68} highlighted precisely these two canons in his own hand.[26] That leaves little room for doubt that it was Durant who helped to point him to these references.

A similar relationship can be demonstrated for Pierre d'Ailly. Paul Viollet noticed long ago that a number of details in d'Ailly's *Tractatus super reformatione ecclesie* correspond closely to Durant's treatise.[27] He repeated, for example, the demand—highly characteristic of Durant—that every episcopal library ought to contain a copy of conciliar canons, and he remarked that the *magnus liber conciliorum generalium* had become very rare, even though it was *perutilis et necessarius*.[28] Similarly he demanded that provincial councils ought to meet at least once every three years and based his demand on two canons—one from Carthage and one from Toledo—neither one of which appears in

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mendicant orders in the second half of the thirteenth century it was forcefully deployed to defend the *status ecclesie* against both papacy and friars; cf. Fuhrmann, *Einfluss und Verbreitung*, 1:569–70; Tierney, *Foundations*, 32–3, 169–70; Congar, "Aspects ecclésiologiques," 61–2; Schleyer, *Anfänge des Gallikanismus*, 80; Marrone, "Ecclesiology," 62–4, 145. C. 24 q. 1 c. 18 supports D. 21 c. 2 from the familiar perspective of St. Cyprian of Carthage. There is a considerable number of possible sources to which Nicholas of Cusa might thus have owed his knowledge of these two canons.

26 In Kues, St. Nikolaus Hospital, ms. 168, fol. 95^{r}, Nicholas annotates the beginning of Durant's long quotation of D. 21 c. 2 and C. 24 q. 1 c. 18 with the words "Petri eminentia." Cf. *Tractatus maior* 1.4, *Rubrica de exemptionibus*, fols. 8^{vb}–9ra. On the first page of his copy Nicholas criticized the scribe: "Liber iste corrupte multum scriptus est."

27 Viollet, "Guillaume Durant," 124–6. Philippe Le Preux, who published the edition of Paris, 1545, had noticed the same similarities already in the sixteenth century. That may well be the reason why François Clousier decided to include Pierre d'Ailly's *Tractatus super reformatione ecclesiae* (or *De emendatione ecclesiae*), in his edition of Durant's treatise, Paris, 1671, along with other famous writings on the reform of the church, such as Nicholas of Clémanges, *De ruina et reparatione ecclesiae*, and the *Consilium de emendanda ecclesia* of 1536, and why he repeated Le Preux's comments on these similarities on p. 244 of his edition.

28 Durant, *Tractatus maior* 2.73 [3.4], fol. 53^{rb}, demanded "quod antiqua concilia in omnibus cathedralibus ecclesiis haberentur." D'Ailly declared: "Similiter in dictis ecclesiis, et maxime in metropolitanis, deberent esse notabiles librariae theologicae et juris canonici ac librorum moralium, et maxime ut magnus liber conciliorum generalium, qui jam rarus est, licet sit perutilis et necessarius, a metropolitanis in magnis ecclesiis procuraretur." D'Ailly, "Tractatus super reformatione," 2:914.

Gratian's *Decretum*, but both of which are quoted by Durant at length and in one and the same passage.[29] That makes it virtually certain that d'Ailly found both of these canons in Durant's treatise.[30]

Unfortunately the cases of Nicholas of Cusa and Pierre d'Ailly are exceptions. Most of the time there are no clues to indicate if a given author relied on a particular canon because he had found it among the more than two thousand citations and quotations with which Durant had filled his treatise, or because he was aware of its significance for other reasons. {68 | 69} So far I have come across no references at all in which Durant is identified by name—except for Bossuet, who explicitly relied on Durant in 1682, at the very end of the period under consideration here, in order to confirm the legality of the four Gallican articles that the bishops of France, basing themselves on the Council of Constance, had just issued in their battle with the papacy—but of course did so only because he confused William Durant the Younger with his uncle.[31] The best one can usually hope for is a case like that of Job Vener, whose *avisamentum* on church reform of 1417 refers approvingly to a *liber generalium conciliorum habitorum in temporibus nos precedentibus*, according to which the decline of Christendom had nothing to do with damnable natural desires, greed, or lust, but only bad habits of which even pagans had been free.[32]

29 D'Ailly, "Tractatus super reformatione," 2:904, invokes III *Carthaginense* c. 2 and IV *Toletanum* c. 3, both of which were quoted by Durant, *Tractatus maior* 2.11, fols. 18^{vb}–19ra; cf. Viollet, "Guillaume Durant," 126–7. Durant, by the way, would have preferred provincial councils to meet at least once or, still better, twice annually; cf. Durant, *Tractatus maior* 2.11, fol. 18$^{rb–va}$. It is true that the three-year period occurs as well: "... certis aliis nihilominus super hoc executoribus et visitatoribus deputatis in singulis regnis qui de triennio in triennium omnibus causis provincialibus interessent et unum concilium post alium facerent celebrari." *Tractatus maior* 2.96, fol. 59^{rb}. But that formulation is not entirely unambiguous and is more likely to refer to the frequency with which such *executores et visitatores* were to participate in the provincial councils taking place in a given province, not to the frequency with which the provincial councils themselves were supposed to meet.

30 Thus Viollet, "Guillaume Durant," 126, was right to conclude: "Il nous paraît, par suite, légitime et même nécessaire de conclure que Pierre d'Ailly a lu et utilisé Guillaume Durant."

31 Bossuet, *Oeuvres de Bossuet*, 31:115–20; cf. Viollet, "Guillaume Durant," 3n3.

32 "Patet hec malicia ... in libro generalium conciliorum habitorum in temporibus nos precedentibus ... et in aureo repertorio Speculatoris, ubi in particulari videntur omnium statuum mundi defectus et peccata, que fidei et rei publice per mala exempla summe sunt nociva, quibus communiter maior pars christianorum publice peccare solet ad libitum, eciam, quod peius est, absque omni impulsu nature aut aliquo lucro vel delectatione, sed ex sola mala consuetudine, quam eciam pagani non habent." Heimpel, *Die Vener*, 3:1297 line 154–1299 line 169. I am grateful to Jürgen Miethke for directing me to this passage. The context leaves no doubt that Vener was not referring to William Durant the

That fits Durant's treatise well, but does not tell us anything precise about the significance Job Vener—not to mention any other readers—may have attributed to any of Durant's particular ideas, and it is deplorably weak evidence for the question if and how the ten-year period might have passed from Durant's treatise into *Frequens*. Matters become far more difficult with writings such as Jean Gerson's *De potestate ecclesiastica* and Nicholas of Clémanges's *De ruina et reparatione ecclesie*, which echo Durant in their conception as well as in a number of details, but without quoting him and without giving us any obvious means to determine whether or not they were drawing on his work.

The extent of the field on which Durant's treatise might have been received is thus out of all proportion to the limited means we have to establish where it was actually received. Nonetheless there are two points of departure from which one can relatively quickly arrive at instructive results. One consists of the information we have about the Council of Vienne, and the other of what we know about the history and distribution of the treatise's manuscripts and printed editions.

4 The Reception of the *Tractatus maior* at the Council of Vienne

When Johannes Haller published his unsurpassed book on the papacy and church reform in 1903, he still believed he could assert with certainty that Durant's reform proposals had had no success at the Council of Vienne at all.[33] But that is untrue. Since 1934 at the latest we know from Ewald Müller's history {69 | 70} of the Council of Vienne that Durant's ideas shaped a number of conciliar decrees, sometimes down to the very wording, and thus became part of canon law in the constitutions of Pope Clement V. There is no need to repeat the details here because they are easy to find in Müller's book.[34] Yet even

Elder's *Repertorium aureum*, where the elder Durant dealt with questions of canon law according to the structure of the *Liber extra*, thereby producing a kind of systematic table of contents for both Gratian's *Decretum* and the *Liber extra*. Like so many others, Vener simply confused the younger Durant with his uncle.

33 Haller, *Papsttum und Kirchenreform*, 65–6.

34 E. Müller, *Vienne*, 591–610. Müller's index, s.v. 'Wilhelm Duranti jun.' offers outstandingly detailed references to the numerous places where Müller recognized connections between Durant's proposals and the decrees of the council. To mention only two examples: first, Durant was one of many who agitated successfully for the confirmation of *Super cathedram*, the bull with which Boniface VIII had settled the relationship between the secular clergy and the mendicant orders in a manner relatively favorable to the former; which Benedict XI had revoked in 1304 to the exasperation of the bishops; and which

Müller failed to notice that among the fragments of the acts of the council there is a piece of evidence that refers directly to Durant's treatise and informs us about the impression he made in Vienne. It consists of a summary of reform proposals intended to prevent temporal lords from invading the rights of the clergy.[35] In the main part of this summary the author limits himself to re-arranging the proposals that had been submitted by a number of different bishoprics and ecclesiastical provinces according to systematic criteria, without paying special attention to their provenance. Towards the end, however, he singles out certain "general proposals which it would lead too far afield to describe here in all details . . . because they do not add anything to the articles individually identified above, but rather amount to certain generic proposals for the reform of the whole."[36] These "proposals for the reform of the whole" came from the province of Bourges. That alone suggests that Durant was their author, for apart from him only two other bishops from the province of Bourges attended the Council of Vienne: his archbishop, Giles of Rome, and the bishop of {70 | 71} Limoges.[37] The suggestion hardens into certainty as soon as one examines the substance of the few details mentioned by the author of the

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Clement V reconfirmed only very reluctantly in the final session of the Council of Vienne under the pressure of repeated demands from the council. *Sacro instante et approbante concilio* is the unusual formula of approbation that Clement V used in this single instance; compare E. Müller, *Vienne*, 491–564, here 547–52, and Clem. 3.7.2 with *Tractatus maior* 2.85 [3.16], fol. 55^{vb}; see also Marrone, "Ecclesiology," 189–200. Second, Durant was personally responsible for a decree in which the council did not only punish anyone who had personally attacked a bishop or participated in a conspiracy against his person ipso facto with excommunication, but also banned their children and grandchildren without hope of dispensation from access to any benefices in the diocese—a measure that Durant had already taken before 1300 in his own diocese and which Boniface VIII had confirmed in 1302; cf. *Tractatus maior* 2.94 [3.25], fol. 58$^{ra–b}$; Clem. 5.8.1; Boniface VIII, *Registres*, 3:631, nr. 4985; E. Müller, *Vienne*, 475–9; Viollet, "Guillaume Durant," 6; Falletti, "Guillaume Durand," 1220. Durant himself had rather more broadly spoken of anyone who had 'injured' the church or the clergy.

35 Printed by Ehrle, "Bruchstück," 399–417. E. Müller, *Vienne*, 471–3, was obviously familiar with this text, but did not notice its relationship to Durant's treatise.

36 "Adduntur tamen aliqua generalia, que longum esset omnia particulariter hic ponere et sunt distincte in quaterno remediorum; nec faciunt ad articulos singulariter supra distinctos; sed sunt quedam provisiones generales ad reformationem universi." Ehrle, "Bruchstück," 415–17, here 415. *Universi* here evidently means something like 'the issue as a whole.'

37 E. Müller, *Vienne*, 664. The exempt bishop of Le Puy attended the council as well.

summary. Every single one of them can be found in Durant's treatise, and some of them are entirely typical of him.[38]

There are two reasons why it should interest us that this report of reform proposals from the province of Bourges refers directly to Durant's treatise. First, these appear to be the only proposals from the province of Bourges that can be demonstrated to have been submitted to the Council of Vienne, which suggests that Durant might have acted as a kind of official representative of his province. That would explain why it was precisely Durant who composed so thorough a memorandum on reform, and it fits well with a long-standing relationship in which the bishopric of Mende had worked closely together with the archbishop of Bourges more than twenty years earlier in order to support him in his battle against the mendicant orders, which the archbishop of Bourges had been spearheading at the time.[39]

Second, we thus learn about an important witness to the reception given to Durant at the Council of Vienne. For the description of the reform proposals from Bourges stems from the committee of cardinals that Pope Clement V had specifically appointed in order to survey all of the proposals that had been submitted to the council and arrange them in an order that would be suitable for deliberation by the council.[40] It thus gives us insight into the reaction of the papal curia—and that was rather reserved. A twentieth-century historian like Müller may have been favorably impressed by the farsightedness of the proposals from Bourges, but the cardinal who reported them to the pope was of the opinion that "they were in some respects not just difficult but impossible to realize."[41]

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38 Thus the proposals from Bourges combine two in themselves unrelated demands in precisely the same manner as Durant: to extend the penalties for attacks on the church to the relatives of the attackers, and to heed the canonical deadlines for excommunications; compare *Tractatus maior* 2.94 [3.25], fol. 58^{ra-b}, with Ehrle, "Bruchstück," 415–16. Further parallels can found in the demand to determine more precisely which cases Boniface VIII's constitution *Quoniam* was intended to punish with excommunication (*Tractatus maior* 2.70, fol. 47ra; cf. X 5.11.19); the proposal to reinstitute so-called *defensores ecclesiae* that had been common in antiquity (*Tractatus maior* 2.40, fol. 34ra); and the description of excommunication as *mucro episcopalis* or *mortalis* (*Tractatus maior* 2.38, fol. 33ra, and *Tractatus maior* 2.28, fol. 28ra).

39 Two clerics from Mende played an important role at the provincial council of Bourges in September 1286 and in the French embassy to Pope Honorius IV in the same year. One was Paul Banciani from Rodez, vicar general of the bishop of Mende, the other Peter of Rodez, provost of Mende; see Glorieux, "Prélats français," 324–30.

40 On this committee see E. Müller, *Vienne*, 117–18.

41 "Meo iudicio <in> aliquibus non solum continent difficultatem sed et impossibilitatem." Ehrle, "Bruchstück," 415; the emendation was made by Ehrle. By contrast, E. Müller,

This is the first concrete piece of evidence for the chilly reception the curia was going to give Durant in Vienne. But it was not to remain the only one. Two letters {71 | 72} written by Pope John XXII to the king and queen of France several years later, in 1319, inform us that Durant's proposals did not exactly endear him to Pope Clement V.[42] Now it is true that in 1319 John XXII was not particularly well disposed towards Durant, in part perhaps because in 1310–11, during the run-up to the Council of Vienne, Durant had opposed Pope Clement V's decision to promote a nephew of Cardinal Jacques Duèse, the future Pope John XXII, to become archdeacon of Mende, albeit without success.[43] Pope John XXII may have exaggerated when he claimed several years after the conclusion of the Council of Vienne that Durant had intended his book to provoke a schism between the pope and the bishops.[44] If it had really been that bad, Clement V would hardly have dismissed Durant with the customary favors at the conclusion of the council.[45] At the same time it is also true that, as Cardinal Jacques Duèse, John XXII had not only participated actively in the Council of Vienne, but was also a member of the very committee of cardinals that compiled the report quoted above, and was accordingly exceedingly well-informed

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Vienne, 471, thought: "So werden hier endlich einmal grundsätzliche Erwägungen angestellt, die uns natürlich einen ganz anderen Einblick in die hier umstrittenen Probleme geben als jenes Gewirre von Einzelbeschwerden und Remedia."

42 John XXII, *Lettres secrètes*, 1:737–41, nrs. 849–50, both dated 10 April 1319. Haller, *Papsttum und Kirchenreform* 58–9, deserves credit for being the first scholar to have drawn attention to these letters, but then overinterpreted them; see above, chap. 3, pp. 200–1.

43 In 1310, in connection with a comprehensive and complicated exchange of benefices held by a number of different clerics, Clement V had ordered François André, Archdeacon of Mende, to turn his archdeaconate over to Jacques de la Rue, a nephew of Cardinal Jacques Duèse. In compensation he was offered the archdeaconate of Fréjus. François André had succeeded Durant as archdeacon of Mende in 1297 and presumably enjoyed his confidence. That, at least, is suggested by Durant's and his chapter's protest against the pope's order on the grounds that, according to long-established custom, only a canon of Mende could become archdeacon. The pope quashed their complaint with the simple expedient of making Jacques de la Rue a canon of Mende as well; see Clement V, *Regestum*, 5:341, nr. 6144, dated 4 September 1310, and 6:107–8, nr. 6726, dated 23 March 1311. Jacques de la Rue died in 1317, but John XXII immediately transferred the archdeaconate to Jacques's brother; see John XXII, *Lettres secrètes*, 1:212, nr. 267; 1:214, nr. 279; 1:227–8, nr. 302; and 1:255–7, nrs. 337, 340, 342, 344.

44 "Sed ipse intendens aliud forsitan quam pretendat, videlicet scisma, quod absit, inter te et Sedem istam ponere sicut et in Viennensi consilio inter felicis recordationis Clementem papam quintum et prelatos studiose ponere laboravit, injuste conqueritur secum agi." John XXII, *Lettres secrètes*, 1:740, nr. 850.

45 E. Müller, *Vienne*, 593.

about the goings-on in Vienne.[46] We thus have no reason to doubt the truth of his assertion that Durant was confronted by Pope Clement V, asked for forgiveness, and dedicated his book to him "with an appearance of the greatest humility."[47]

We can go still further, for even though John XXII does unfortunately not give us to understand precisely which book Durant dedicated to the pope, it is {72 | 73} at least possible that it was not identical to the book he had written prior to the Council of Vienne. We know from the manuscripts that, while the council was in session, Durant composed a second, much shorter piece of writing, which I have called *Tractatus minor*, and which the printed editions and, until recently, the secondary literature invariably treated as part of the *Tractatus maior*.[48] But the differences are crucial, for even though the *Tractatus minor* is founded on the same principles as the *Tractatus maior* and makes hardly any proposals that cannot be found in the *Tractatus maior*, too, sometimes verbatim, it nonetheless presents an altogether different program of reform. That is not so much because of what it says as because of what it does not say. There is no more mention of any thorough reorganization of the relationship between church and state, no mention of revoking all exemptions, and above all no mention of a new role for general and provincial councils—in short, no mention of the fundamental questions about the constitution of the church Durant had raised in the *Tractatus maior*. Instead Durant now stressed the primacy of the papacy and focused his reformatory attention closely on three specific and far less controversial subjects: the education of the clergy, the improvement of the care of souls, and the standardization of the liturgy. The *Tractatus minor* thus contains a program of reform that was much reduced and thoroughly transformed, not really in its principles, but very much so in its orientation, because it abstained from all of the radical changes in the church that made the *Tractatus maior* famous and, almost certainly for that very reason, provoked the disapproval of Clement V and John XXII.[49] That makes

46 E. Müller, *Vienne*, 118.

47 "In consilio siquidem Viennensi, contra felicis recordationis Clementem papam quintum, predecessorem nostrum, cui ipsum fidelitatis vinculum astringebat, scisma suscitare voluit et temptavit librum contra ipsum et Sedem hujusmodi, sicut notum est fratribus nostris qui tunc aderant et multis aliis, fabricando, et demum cum hec ad prefati predecessoris nostri notitiam pervenissent, librum ipsum cum humilitate apparenti maxima, eidem predecessori nostro, petita venia, assignavit sicut sciunt qui reconciliationem hujusmodi procurarunt." John XXII, *Lettres secrètes*, 1:739, nr. 849.

48 See above, chap. 2.

49 This conclusion should not lead to the impression that Durant refrained from criticizing the papacy in the *Tractatus minor* at all. To the contrary, his assertions about the faults of

it reasonable to suppose that Durant wrote the *Tractatus minor* in the context of his disagreement with Pope Clement V.

There is a certain sense in which the changes Durant made to his plans for reform in the *Tractatus minor* anticipate the fate of the conciliar movement as a whole. Just as the *Tractatus maior* can be read as a kind of manifesto for the measures taken by the Council of Constance in order to put an end to the Great Schism in the fifteenth century, so the *Tractatus minor* can be read as a manifesto for the measures taken by the Council of Trent in the sixteenth century, after the conciliar movement had been confronted and defeated by the papacy. At bottom Johannnes Haller thus turns out to have been right after all, for even if Durant did manage to have some of his ideas enacted into law by the Council of Vienne, he failed abjectly with his plan to reshape the constitution of the church on a conciliar foundation. That plan did not achieve genuine favor until the time of the Great Schism and the height of conciliar movement, and it was not going to fail decisively until the sixteenth century.

5 The Manuscript Transmission of Durant's *Tractatus maior* and *Tractatus minor*

This understanding of the reception of Durant's ideas is confirmed by the manuscript transmission.[50] We know of only two manuscripts that can claim to have been written in {73 | 74} the fourteenth century. One was owned by Pope Benedict XIII and must unfortunately be considered lost.[51] Benedict XIII valued it highly enough to include it in his so-called Bibliotheca Minor, that is, the selection of books he took along with him on his travels through Europe from 1403–11, when he left most of his library behind in Avignon. Even though there is no earlier evidence for the existence of this manuscript than the catalog of the Bibliotheca Minor published by Anneliese Maier, it is certainly conceivable that it is this same manuscript that Durant himself is supposed to

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the papacy are in some ways even more pointed than in the *Tractatus maior*. But absent a plan to change the constitution of the church in its foundations, they seem more like impotent moralizing, which could afford to be more sharply critical of the pope precisely, and only, because the responsibility for church reform had now been left entirely in his hands.

50 Unless stated otherwise, the evidence supporting the following observations will be found in Fasolt, "William Durant the Younger's *Tractatus*," and above, chaps. 1–2, with detailed references to the relevant scholarly literature.

51 Maier, "Bibliotheca Minor," 3:37, nr. 312: "Item alius tractatus conciliorum episcopi Mimantesis [sic] de hijs que fuerunt celebrata in concilio Vienensi in perg. (post., rub.)."

have dedicated to Pope Clement V.[52] I have unfortunately not been able to determine what happened to this manuscript after Benedict's library was dissolved in Peníscola.

The other manuscript that dates from the fourteenth century is especially important.[53] Not only is it one of only two manuscripts containing both the *Tractatus maior* and the *Tractatus minor*, but it is also the only surviving witness to one of the two main branches into which the manuscript transmission of Durant's treatise can be divided. In spite of its copyist's mistakes, it is in many places superior to all other surviving manuscripts. It is written in a commonplace rotunda and has marginal annotations and decorations in a style that allows no more specific identification of its provenance than that it was almost certainly written in Southern France before the end of the fourteenth century, perhaps during the years from 1360–80.[54] It may have come from Avignon, Toulouse, or perhaps from Montpellier, where Colbert purchased it in 1682 from its first known owner, a certain M. de Rignac, who served as counselor on the local Cour des Aides.

Durant's treatise thus does not seem to have circulated widely during the fourteenth century. But that changed in the fifteenth century, particularly after the Council of Basel. Apart from the manuscript just mentioned, we have nine other manuscripts, all of which were written in the fifteenth century. {74 | 75} Only one of these manuscripts, held by the Bayerische Staatsbibliothek in Munich, contains both the *Tractatus maior* and the *Tractatus minor*.[55]

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52 Yet the first version of the catalog of the Bibliotheca Minor—the "Libri qui portantur ubique pro servitio domini nostri"—does not contain any mention of Durant's treatise; see Maier, "Bibliotheca Minor," 7.

53 Paris, Bibliothèque Nationale, ms. lat. 1443.

54 For their help with the difficult question how to date this manuscript I would like to thank Marie-Thérèse d'Alverny, Gilbert Ouy, Neil Ker, Bernard Bischoff, and especially Monique-Cécile Garand; cf. above, chap. 1, pp. 113–15. I am particularly indebted to Monique-Cécile Garand for the valuable observation that a copy of Bernard Gui's *Speculum sanctorale* in Paris, Bibliothèque Nationale, ms. lat. 5407, is written in a similar hand and was completed in 1378 at the request of Cardinal Guillaume de Chanac; see Samaran, *Catalogue des manuscrits datés*, 2:271; *Dictionnaire d'histoire et de géographie ecclésiastiques*, 12:350–1; and Baluze, *Vitae paparum Avenionensium*, 2:606–14. Guillaume de Chanac is likely to have hailed from the Gévaudan and became bishop of Mende in 1371. One would like to believe that Bibliothèque Nationale, ms. lat. 1443, was also copied at his request, but unfortunately the similar script alone is insufficient to justify such a conclusion.

55 Munich, Bayerische Staatsbibliothek, Clm 6605, fols. 1–69^{v}.

Five other manuscripts contain the complete text of the *Tractatus maior*.[56] The remaining three manuscripts contain only fragments of the *Tractatus maior*.[57] In addition we have six printed editions from the sixteenth and seventeenth centuries: the editio princeps by Jean Crespin in Lyon, 1531, reprinted in 1534 with a new frontispiece; three closely related editions ultimately based on the editio princeps, namely, by Philippe Le Preux in Paris, 1545, Michele Tramezino in Venice, 1562, and François Clousier in Paris, 1671; and two editions included in multi-volume collections of legal writings that are similarly based on the editio princeps: one in the second volume of the *Tractatus ex variis iuris interpretibus collecti* printed in Lyon, 1549, and the other in the famous *Tractatus universi iuris* printed in Venice, 1584.[58]

The sheer number of manuscripts and prints in which Durant's treatise was transmitted is hardly overwhelming. But its significance should not be underestimated. A standard reference work for daily use like the *Speculum judiciale* by Durant's uncle and predecessor in Mende, the famous Speculator, is preserved in almost one hundred manuscripts, and library catalogs refer to more than fifty different printed editions.[59] Durant's treatise can hardly measure up to those numbers. But it does measure up very well to the transmission of Nicholas of Cusa's *Concordantia Catholica*, which Gerhard Kallen shows to consist of eighteen complete manuscripts, five fragmentary ones, and four

56 Kues, St. Nikolaus Hospital, ms. 168, fols. 1–95^{v}; Rome, Biblioteca Nazionale Centrale, Fondo Varia, ms. 1, fols. 85–196^{v}; Vatican City, Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487, fols. 313–62; Paris, Bibliothèque Mazarine, ms. lat. 1687, fols. 1–82; and Troyes, Bibliothèque Municipale, ms. 786, fols. 1–179. {Strictly speaking none of these manuscripts reproduces the *Tractatus maior* in its entirety; all of them break off at the very same point a few lines short of the end of the *Tractatus maior*. For details see above, chap. 2, pp. 178–9.}

57 Tours, Bibliothèque Municipale, ms. 237, ends in the middle of chapter seventy-one of part two of the *Tractatus maior*. Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823, fols. 23–53, and Zurich, Zentralbibliothek, ms. S 204 0, fols. 129–41, do not go much beyond the end of the first part of the *Tractatus maior*.

58 *Tractatus ex variis iuris interpretibus collecti*, 2:88^{v}–117^{v}, and *Tractatus universi iuris*, 13/1:154–82^{v}. {The edition by Philippe Le Preux was printed by two different printers: Poncet Le Preux and Galliot du Pré. The 1562 edition reproduces the edition by Philippe Le Preux. The 1671 edition does so, too, but takes much greater liberties with the text and its arrangement.}

59 These numbers result from scanning the familiar catalogs of early prints and combining them with the information furnished by Le Clerc, "Guillaume Duranti," 449–56, and Schulte, *Geschichte*, 2:144–56.

editions printed between 1514 and 1609.[60] Given the age, complicated form, and highly technical contents of the *Tractatus maior*, one may consider it a mark of genuine success that it was printed more frequently, and for a longer period of time, than a book that is often considered to be one of the main theoretical accomplishments in the entire history of the conciliar movement. {75 | 76}

The first and foremost reason for the depth and durability of the reception given to Durant's treatise is probably the Gallican tradition of promoting close cooperation between church and state, which rested on solid theoretical foundations developed by the University of Paris, and which is well known to have been firmly allied with the conciliar movement. It is clearly reflected both in the ownership of the manuscripts of Durant's treatise and in the history of the printed editions.

First in line is Paris, Bibliothèque Mazarine, ms. lat. 1687, a miscellany containing a number of works by authors among whom John of Paris, Konrad of Gelnhausen, Jordan Brice, Antonius de Butrio, Jean Mauroux, and Giuliano Cesarini are worth special mention. Towards the end of the fifteenth century this manuscript was owned by Louis Pinelle, who became rector of the Collège de Navarre in 1497, later served as chancellor of the University of Paris, and concluded his life as bishop of Meaux, where his immediate successor, Guillaume Briçonnet, undertook a well-known attempt to reform the French Church in collaboration with Jacques Lefèvre d'Etaples. Then there is Troyes, Bibliothèque Municipale, ms. 786, which corresponds so closely to the first part of the manuscript owned by Louis Pinelle that it must have been copied from it directly or else was copied from another closely related copy. At the end of the sixteenth century this manuscript was owned by Pierre Pithou, the French humanist, legal scholar, and author of a famous piece on the *Libertez de l'Église Gallicane*, which has been called one of the founding documents of French parliamentarians well into the eighteenth century.[61]

As late as the second half of the seventeenth century the conflict between Louis XIV and the papacy raised Durant's work once again to a place of honor. In 1668, in the fourth volume of his history of the University of Paris, César Du Boulay reprinted Durant's chapter on exemptions, in which Durant had stated

60 Nicholas of Cusa, *Concordantia Catholica*, ed. Kallen, xiii–xxix. I am grateful to Erich Meuthen for pointing out that the printed editions contain Nicholas of Cusa's *Opera omnia*, which makes them poor evidence for any particular interest in the *Concordantia Catholica*.

61 "Le texte classique où puisèrent les parlementaires, notamment au XVIII[e] siècle." Carreyre, "Pithou," 12:2237.

his fundamental views on papal primacy.[62] In 1671 François Clousier reprinted the whole treatise and dedicated it to the young Achille du Harlay, count of Beaumont, who later became president of the Parlement of Paris and earned himself a reputation as an unflinching supporter of the Gallican cause. In 1682, at the height of the Gallican crisis, Bossuet, as mentioned before, referred explicitly to Durant in his defense of the Gallican articles. Finally it was in the same year of 1682 that Colbert purchased his manuscript of Durant's treatise with the help of his librarian Baluze. It would surely be worthwhile to undertake a thorough examination of the place Durant's treatise may have occupied in this entire tradition, from Pierre d'Ailly and Jean Gerson in Paris and Constance, via Louis Pinelle in Paris, the reform circle of Meaux, and the humanist legal scholar Pierre Pithou in Troyes, down to Bossuet, himself a bishop of Meaux, and beyond.

A second center of gravity for the reception of Durant's treatise can be found, tellingly enough, in the curia and at the Council of Trent. Apart from the lost manuscript owned by Pope Benedict XIII we know of an unusually compendious miscellany that is closely associated with the history of the Council of Florence, of which at least a part was owned by {76 | 77} Cardinal Marco Barbo in the second half of the fifteenth century, and which is now part of the Barberini collection.[63] In addition there is a manuscript that Guglielmo Sirleto, scriptor in the Vatican Library and later cardinal, who made his reputation at the Council of Trent, owned in the middle decades of the sixteenth century.[64] The printed editions speak even more clearly. In 1545, on the occasion of the opening of the Council of Trent, Philippe Le Preux, a legal scholar from Bourges who was later appointed *officialis* of Amiens and papal chaplain, had the treatise printed in Paris and dedicated it to Pope Paul III, expressing his hope that Durant's salutary proposals might help to eradicate Protestant heresy.[65]

62 Du Boulay, *Historia Universitatis Parisienis*, 4:130–8.

63 Vatican City, Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487. Careless reading of Tomasini, *Bibliothecae Patavinae*, 12–15, once led me to assert that this manuscript originated in the library of San Giovanni in Verdara in Padua; see above, chap. 1, p. 137 n. 73. Montfaucon, *Bibliotheca Bibliothecarum*, 485 D, who also lists this manuscript as located in Padua, seems to have fallen victim to similar carelessness. I am so much the more grateful to Jürgen Miethke for correcting my mistake in Miethke, "Nachricht."

64 Vatican City, Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823.

65 In the preface to his edition, sig. a iiv, Philippe Le Preux describes Durant's treatise as "dignum certe opus, quod omnium teratur manibus, quodque ob oculos omnium versetur, ob multiiugam conditionem, et in quo contineantur omnia, quae in conciliis universalibus proponenda sint et tractanda, et in his praesertim fidei tractatur negotium, quibusque mediis infandissimum haereticae pravitatis crimen e Christianorum animis eradendum sit: quod prohdolor multis iam retroactis annis, non sine gravi animarum

Michele Tramezino's print of Venice, 1562, does not contain any preface from which it might be possible to learn about his motives, but the point in time at which it appeared and its close resemblance to the edition of 1545 do at least suggest that the occasion was furnished by the opening of the third and final meeting of the Council of Trent. The massive *Tractatus universi iuris* published under the auspices of Pope Gregory XIII in connection with the restoration of canon law in the aftermath of the Council of Trent belong in the same context.

In the third place a number of manuscripts are of course directly related to the conciliar movement itself. Here it must be stressed that it was not the Council of Constance, but only the Council of Basel that made the decisive contribution to the dissemination of Durant's ideas. None of the surviving manuscripts can be attributed to Constance with any degree of certainty, and there is only one for which the lack of any specific evidence to the contrary makes it so much as possible to consider such an attribution.[66] By contrast, a considerable body of evidence points to the Council of Basel. One manuscript was obviously copied in Basel during the 1430s, namely the one that Nicholas of Cusa had made for himself there and bound together with a collection of the council's acts. In addition there are several miscellaneous manuscripts whose contents are closely related to the history of the Council of Basel. That includes not only the Barberini manuscript, Louis Pinelle's manuscript now in the Bibliothèque Mazarine, and the Ottobonianus once owned by Guglielmo Sirleto, but also the manuscript now in {77 | 78} the Fondo Varia of the Biblioteca Nazionale Centrale in Rome and the manuscript held in the Bayerische Staatsbibliothek in Munich. To this substantial list one may also add the fragment that is now kept in the Zentralbibliothek of Zurich and was copied by Peter Nümagen. For Nümagen served as secretary for the Council of Basel that Andrea Zamometič tried without success to revive in 1482. Nümagen later became notary of the Grossmünster in Zurich, to which he left his books and where he died not long before Zwingli's reforms. Six out of the ten surviving manuscripts thus are more or less directly related to the Council of Basel.[67]

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iactura, impune toto orbe grassatur." Now there is some information about Le Preux in Izbicki, " 'Clericis Laicos'," 190.

66 Tours, Bibliothèque Municipale, ms. 237. {But given the close relationship between the text of this manuscript and manuscripts demonstrably written at the Council of Basel, such as Munich, Bayerische Staatsbibliothek, Clm 6605, and Kues, St. Nikolaus Hospital, ms. 168, it seems exceedingly unlikely that it was copied before the Council of Basel.}

67 Kues, St. Nikolaus Hospital, ms. 168; Vatican City, Biblioteca Apostolica Vaticana, ms. Barb. lat. 1487; Paris, Bibliothèque Mazarine, ms. lat. 1687; Vatican City, Biblioteca Apostolica Vaticana, ms. Ottob. lat. 823; Rome, Biblioteca Nazionale Centrale, Fondo Varia, ms. 1; and

The geographical distribution of the manuscripts is altogether typical. France, Italy, and Germany are well represented, Spain and England not at all—though I do not want to exclude the possibility that some manuscripts may have escaped my notice so far. Protestants naturally showed no interest in Durant whatsoever, and Catholics did so first and foremost if they had a special interest in church reform. Manuscripts were sometimes owned by individual scholars, sometimes by the libraries of cathedral chapters, monasteries, and universities.

The Council of Basel clearly played a crucial role in disseminating Durant's ideas so widely that they continued to be given serious attention, more or less without interruption, until the end of the seventeenth century. At the same time this attention did not extend to all parts of the treatise to the same degree. It is not difficult to tell that specific aspects of Durant's conciliar theory and his proposals for limits on papal primacy provoked the greatest interest. That is almost certainly the reason why some scribe, probably at the Council of Basel, gave the treatise the title *De modo generalis concilii celebrandi*, under which it continues to be known today, but which rather obscures the nature of its contents.[68] It is also the reason why the two manuscripts owned by Peter Nümagen and Guglielmo Sirleto contain only the first part of the *Tractatus maior*, in which Durant offered a systematic justification of his conciliar demand—and these are tellingly {78 | 79} also the only two manuscript whose contents clearly reveal interests shaped by Humanism. It is for this same reason that Nicholas

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Munich, Bayerische Staatsbibliothek, Clm 6605. Zurich, Zentralbibliothek, ms. S 204 0, may be considered a late addition to this list.

68 There is no record of an authentic title. The best manuscript, Paris, Bibliothèque Nationale, ms. lat. 1443, has no title at all. The next best, Munich, Bayerische Staatsbibliothek, Clm 6605, has no title either, but a title added in a later hand on fol. 2^{r} fittingly calls the treatise *Tractatus Guilhelmi Durandi de reformacione ecclesie universalis*. Haller, *Papsttum und Kirchenreform*, 60, apparently without knowing the Munich manuscript, similarly maintained that *De reformatione ecclesiae in capite et membris* would characterize its contents better than the traditional *De modo generalis concilii celebrandi*. *De modo generalis concilii celebrandi* is found only in the remaining eight manuscripts, all of which contain only the *Tractatus maior*, or fragments of the *Tractatus Maior*, and whose common ancestor was hardly copied before the Council of Constance, more likely at the time of the Council of Basel. The only authentic evidence for Durant's own understanding of his work thus is the word *tractatus*, which he uses in his preface to the second part of the treatise, *Tractatus maior* 2, *Prefatio*, fol. 13^{rb}: "Incipit secunda pars istius tractatus . . . ." It is true that this is not really a title but only designates a literary genre. But it is nonetheless telling for the place of Durant's work in medieval intellectual history. On this subject see above, chap. 5.

of Cusa, Du Boulay, and Bossuet all showed a special interest in Durant's chapter on exemptions. The rest of the *Tractatus maior* gained a less favorable reception, and the *Tractatus minor* disappeared entirely from most of the manuscripts. The lack of interest in the concrete, time-bound, and often entirely untheoretical details of Durant's program of reform is clearly reflected in the introduction to the editio princeps, in which its publisher Jean Crespin came close to apologizing for having printed the text in its entirety even though substantial parts of it "will seem alien to the institutions of our age."[69]

6 Conclusion

The main conclusion to be taken away from these considerations is that roughly from the beginning of the fifteenth century to the end of the seventeenth century Durant's treatise was copied, read, and printed without any major interruptions. That made it a notable success. In part its success is surely to be explained by the fact that Durant was regularly confused with his famous uncle.[70] One can understand the reasons why copyists and printers were delighted to reproduce the treatise if one knows the obvious satisfaction with which Bossuet believed he could use it to quote the Speculator in support of his own views: "The greatest man of his age, a luminary not only of France but of the Catholic Church, whom the interpreters of papal law themselves love to follow, who stood in the highest graces of the Roman popes, who composed his book on the reasons for convoking a general council at the request of Pope Clement V, and who thereby opened a path to the Council of Vienne, of which

69 "Nonnulla fortasse ab huius aetatis institutionibus videbuntur aliena. Quae reliquimus integra quoniam authoris ea sententia fuit, quam supprimere iniquum prorsus visum est." *De modo generalis concilii celebrandi tractatus*, ed. Crespin, fol. 2ra.

70 Only the Barberini codex distinguishes him explicitly from the Speculator. Three manuscripts simply give his name without identifying him any further. But six manuscripts expressly name the Speculator as the author, namely those held in Tours, Troyes, Kues, Zurich, the Biblioteca Nazionale Centrale in Rom, and the Bibliothèque Mazarine in Paris. Jean Crespin canonised the confusion for all later readers by introducing his edition with a *vita authoris* that described the life of the Speculator, unceremoniously prolonged it far beyond the date of his actual death in 1296 all the way to the Council of Vienne, and then unsurprisingly pronounced him to have died at an advanced old age: "Obiit etate iam edita, et in senium vergente, Romeque, quemadmodum ipse prescripserat, sepultus est." *De modo generalis concilii celebrandi tractatus*, ed. Crespin, fol. 3^{v}.

he himself was the most distinguished participant."[71] William Durant the Younger's conciliar treatise can only have benefited from the prestige enjoyed by the Speculator. In the final analysis, however, its success must chiefly be attributed to the significance of ideas that anticipated the most important measures of the Council of Constance by more than a hundred years, and that for more {79 | 80} than two centuries thereafter attracted the interest of a series of readers—jurists, philosophers, cardinals, bishops, humanists, Gallicans, and conciliarists—many of whom played a significant part in the history of the late Middle Ages and early modern times, and some of whom deserve to be included among the most distinguished personages of the age.

71 "Haec scripsit ille Durandus Mimatensis Episcopus, sui aevi vir maximus, neque tantum Galliae, sed etiam Catholicae Ecclesiae lumen, quem juris pontificii interpretes potissimum sequuntur; qui Romanis Pontificibus gratissimus vixit, ac de Concilii oecumenici habendi ratione a Clemente V jussus, haec scripsit, viamque celebrando Viennensi Concilio, cujus ipse pars fuit maxima, praeparavit." Bossuet, *Oeuvres*, 31:119.

CHAPTER 7

William Durant the Younger and Conciliar Theory

William Durant the Younger (ca. 1266–1330) had a sharp mind, deep familiarity with the law of his times, and the practical experience necessary to understand exactly what was wrong with what he, like others, called 'the state of the church.'[1] He also had the ability to argue from principles to conclusions and the courage to state his conclusions in public—at least until his superiors taught him to proceed with greater caution. The result were some rather radical ideas that reverberated through the later Middle Ages and beyond. They are contained in a long treatise on the reform of the church (*Tractatus maior*), which he submitted to the Council of Vienne in 1311, and a shorter one (*Tractatus minor*), which he wrote at the Council of Vienne while it was still in session, and after having had what appears to have been an unpleasant encounter with Pope Clement V. The purpose of this article is to focus on the underlying significance of his ideas for our understanding of the conciliar movement and its place in European history.

The significance of Durant's ideas ought not to be confused with their influence. Influence is the historian's term for the efficient causality of ideas. Modern science, according to a wide-spread commonplace, has taught us {385 | 386} to focus our attention on efficient causality to the exclusion of all other possibilities. Merely to take the notion of formal or final causality seriously is likely to create bewilderment and misunderstanding. The great interest historians take in tracing influence thus is perhaps a measure of the tribute they pay to modern science, but it is clear neither that such tribute is deserved nor that

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1 I have previously dealt with the same subject in *Council and Hierarchy: The Political Thought of William Durant the Younger*. I am returning to it here wishing neither to change nor to expand the interpretation I have already offered to the public, but to make its central features more clearly perceptible than they are amidst the detailed analysis of the evidence that takes center stage in *Council and Hierarchy*. Readers who would like to know more than can be written here about the evidence and its interpretation are referred to the passages in *Council and Hierarchy* indicated in the footnotes below, where they will also find the Latin original of quotations I have translated into English.

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modern science wants it. That is at least one good reason why it may be worthwhile to deflect attention from whatever efficient causality (influence) Durant's ideas may have exercised and focus it on their formal and final causes instead—on the questions what they were and where they led.[2]

What, then, were Durant's ideas? The treatise that he submitted to the Council of Vienne in 1311 bristles with all sorts of complexities. But most of these are superficial. At bottom, it was founded on a few straightforward premises. These premises can be stated and counted in different ways, depending on how closely you want to look, the order in which you want to proceed, and the case you want to argue. For the purposes of this article they are best summed up in three propositions.

The first was that actions are right only if they conform to the law of the church. There are many questions that would need to be answered in order to make this a workable principle. For example, what, precisely, is the law of the church? Is it limited to the Bible? If so, all of the Bible, including the Mosaic Law, or only parts of the Bible? Does it perhaps include conciliar canons and papal decretals as well? If so, which canons and which decretals? Are such canons and decretals human law or divine law? What is the relation between human law and divine law in the first place? Who decides the meaning of the law in case of doubts or contradictions? What if someone is ignorant of the law? And perhaps most important: How do you verify that conduct does in fact conform to the law? Durant struggled with those questions and with others like them. But none of the practical and theoretical difficulties they raised ever shook his conviction that they could be answered and that the solution was contained in the holy books and the canonical writings transmitted from antiquity. His entire work rests on one simple idea: to act rightly means to act in conformity with the laws established and transmitted from antiquity.[3] And to {386 | 387} judge rightly means to judge actions by those laws.[4] Those laws were old, good, and true. They were the real authorities; the people who applied them were merely their servants.

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2 For Durant's influence, see above, chap. 6.

3 "If the ecclesiastical and the earthly powers wish to govern the world and the human race salubriously, they ought to conform their deeds and words to divine and human laws, subject themselves to these laws by imitation, give examples of what ought to be done to their followers and subjects, and govern the commonwealth neither for the sake of their presidency nor in order to enrich themselves or their family." *Council and Hierarchy*, 155–6.

4 "As St. Augustine says in *De vera religione*, although men make judgments about temporal laws when they enact them, once such laws have been enacted and affirmed no judge may judge about them, but only according to them." *Council and Hierarchy*, 166. What Durant says here about temporal law applies *a fortiori* to divine and natural law.

The second proposition consisted of Durant's conviction that the world had fallen away from obedience to the law.[5] Like other reformers, he judged the actions of his contemporaries according to the law and found that they were wanting. More unusually, he studied the ancient canonical collections and found that the actions of his contemporaries could not possibly have matched the law because so much of that law had been forgotten or superseded by recent and, in his opinion, ill-advised legislation.[6] In large stretches his treatise, therefore, reads like a litany of indictments against contemporary conduct and a lament over the passing of the ancient law.

The third proposition was that the disrepute of ancient law and the sorry state of the contemporary world had not been caused by ill will but by ignorance: ignorance of the law in general, ignorance of the ancient law in particular, and ignorance of the proper ways and means to apply the law to circumstances that could not possibly have been foreseen at the time of its creation.

Despite the underlying gloom so typical of Durant and reformers like him, this was a happy message. Had the trouble lain with some ineradicable flaw in human nature, some profoundly corrupted will, or some inescapable destiny preventing human beings from knowing exactly what was right and what was wrong, there would have been little hope for reform. But from Durant's perspective the trouble was neither that human beings willfully did what they knew to be wrong nor that they could not tell what was right. He was certain that human beings who know what is right will do what is right, and knowing what was right was easy. All you had to do was read the books that contained the law, and especially the ancient books that contained the ancient law. The trouble was simply that not enough people read those books and that even fewer understood them as they ought to have been understood. It was ignorance {387 | 388} that was the mother of all vices,[7] but ignorance could be

5 "If we remember with Pope Alexander how this holy church of God was originally planted, we cannot but feel grief that, not all of us in every way, but so many of us have fallen away in so many different ways from the primitive church as it was established by the holy fathers, councils, and Roman popes, that some of us seem to have become entirely oblivious of its original institution." *Council and Hierarchy*, 269n40.

6 "I read the constitutions for the state of the universal church which the holy fathers, general and provincial councils, and others carefully established once upon a time, which we have abandoned in many ways, and I decided to write down what in my humble view ought to be done by the council that is going to meet in Vienne." *Council and Hierarchy*, 115; cf. 116–17.

7 "Ignorance is the mother of all vices and God's priests must avoid it more carefully than anybody else because they have taken it upon themselves to teach the people." *Council and Hierarchy*, 193n67; cf. 126–7.

conquered by enlightenment. Whence not only Durant's practical proposals for better schools and education but also his demand to subject power to reason in general and his conviction that the reform of the church agreed with the will of God as much as the will of man.[8]

In this regard Durant deserves to be ranged with rationalists and optimists like Socrates and Diderot, as opposed to men like Augustine or Luther. He was inspired by the conviction that human beings were not only in a position to determine right and wrong reliably but also in a position to do something about it—though not, admittedly, exclusively by their own lights but by the light of the law which had been revealed to them by God and which they had in the meantime elaborated in divinely inspired assemblies and institutions. The foundation furnished by that law was firm beyond dispute, even if its rationality was sometimes difficult to grasp by mere mortals who are subject to the passage of time.

There may thus have been a great deal that was wrong with the church, but none of it touched the foundations. On the contrary, what was wrong was that the foundations of the church had all too often been abandoned, and the chief reason for that was a kind of forgetfulness. The ministers of the church, including the pope, knew neither the law they were supposed to apply nor the circumstances to which they were supposed to apply it as well as they should have. That was why the church was rife with abuse, not because anything was wrong with its structure or its law. The practice needed improvement, not the principle. From Durant's point of view the structure and law of the church, as he believed them to have been established by Christ, were supremely rational tools of human governance. If the source of that rationality transcended purely human understanding, this merely served to confirm his optimism about the rationality of the attempt to make human conduct conform to law.

Durant thus displayed what Arthur O. Lovejoy once referred to as a "peculiarly exuberant kind of this-worldliness," distinguishing it from the "other-worldliness" so memorably symbolized in Plato's image of the cave—and it is hardly an accident that Durant's 'this-worldliness' was firmly joined to a particular instance of that hierarchical view of the world whose general history {388 | 389} forms the subject of *The Great Chain of Being*.[9] For Durant, there was no cave, nor was there an unbridgeable chasm between 'the good' and

8 "Power must be ruled, limited, and restricted by reason, so that reason rules overall, as Pope Gregory wrote to Emperor Maurice." *Council and Hierarchy*, 145. "Let me therefore repeat that such reform in head and members conforms with the will of God, and consequently also with the will of man." *Council and Hierarchy*, 131. For the reform of education, see ibid., 126–7, 193–6, 244.

9 Lovejoy, *Great Chain of Being*, 45.

everyday reality. Instead there was a "great order of difference," to use a phrase he borrowed from Pope Gregory the Great.[10] This order was grounded in reason and joined all creatures together in a structure that, however finely subdivided, was continuous. Its continuity assured each creature, from the lowest down here on earth to the highest angels in heaven, of a direct link to God. Hence Durant saw no fundamental difficulty in the relationship between reason and power, truth and authority, or law and justice. Fundamentally, these were all in harmony with each other because they all emanated from a single source, an all-knowing, all-powerful God. Fundamentally, the good and the true, the real and the ideal were united. There could be no such thing as purely irrational force. There could be no chasm dividing reason from power, truth from reality, justice from law, or right from might. Truth, if properly understood, had real effects; right, if properly acknowledged, had genuine might; law, if properly remembered, would be thoroughly obeyed; and good examples, if given not only by words but also by deeds, would actually be followed.[11]

In all of these ways Durant expressed a particular variety of a faith so basic in medieval times as to be commonplace: the faith that there exists a timeless and transcendent kind of authority that unites all forms of power—the real as well as the ideal—under a single heading.[12] This faith was of course not unqualified. But it was basic, and its qualifications took another shape than they would in modern times. Durant's writing thus displays a considerable degree of gloom but scarcely a trace of cynicism. It is characterized by a keen awareness {389 | 390} of the many ways in which the ideals enshrined in holy canons were being violated in practice every day but hardly a suspicion that they might be 'mere' ideals that could be ignored even if they were properly remembered.

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10 *Council and Hierarchy*, 178–9.

11 Ibid., 212–16.

12 One hesitates to use a German concept like *Weltanschauung* or a French one like *mentalité* to refer to the faith in question. But it is a fact that it has received more explicit recognition in German and French than it has in English historiography. A classic statement is Kern, "Recht und Verfassung." For a more recent account see Wieacker, *Privatrechtsgeschichte*, 45–60, esp. 49–50, 54–6. For classic studies of particular applications of this view of the world to different areas of medieval life see, for example, Marc Bloch's study of the medieval belief in the supernatural power of royalty, *Royal Touch*, esp. 216–17; Gerd Tellenbach's account of the "ecclesiastical claim to world-domination" in *Church, State, and Christian Society*, esp. 21–3, 162–8, (166 for the "claim to world-domination"); and Otto Brunner's demonstration of the rationality of the feud as an instrument of medieval governance in *Land und Herrschaft*, recently translated into English by Howard Kaminsky and James Van Horn Melton as *Land and Lordship*, esp. 114–24.

His very style of writing was grounded in those convictions.[13] Because Durant was sure that legal writings had real authority, he hesitated to use his own voice—the voice of the person whom we consider to be the 'author'—whenever it was possible to quote the laws instead. He preferred to let the authorities speak for themselves. He favored an impersonal manner of expression that is as directly linked to his understanding of reform as it has been irritating to his modern readers. Above all else, of course, he presented a program of reform whose outline and details, including his demands for reenacting the law of the past and assembling general councils every ten years, are directly founded on his basic conviction that both reason and power were inseparably present in the authorities.

These, then, were Durant's most basic arguments: the law was good, but it was not being obeyed, and the reason for that was ignorance. They can be summed up in his conviction that the law pointed a "short road to reform."[14]

What was the program of reform that followed from these ideas? Reform, he established first, had to begin at the top of the hierarchy, which is to say, with the church.[15] The clergy had to show their flock what good conduct was. The flock could hardly be expected to behave as good Christians were supposed to do unless they had learned good behavior from the only source accessible to them, the example of their priests and bishops. Once good examples were given, Durant was convinced that the success of reform was assured. The trouble was that priests and bishops were in no position to go ahead with good examples. In order for them to be able to do so, he established next, they had to be better informed about the source from which good conduct flowed.[16] That is, they had to be educated in the law of the church both old and new.

It was at this point in his argument that Durant had to address the chief difficulty in the way of relying on the law among the several difficulties that were mentioned above.[17] He recognized full well that the law did not always point the road to reform with equal clarity. He was aware that old laws must sometimes be changed, or even abandoned, in order to keep up with the times, that new laws must be made to deal with unforeseen events, and that all laws must be interpreted. He recognized, in other words, that the spirit of the law was not always evident in the letter. He admitted, therefore, that just as Christ

13 On Durant's style as an expression of his fundamental beliefs see *Council and Hierarchy*, 122–8.

14 Ibid., 132.

15 Ibid., 129–32.

16 Ibid., 132–5, 193–6.

17 Ibid., 135–44.

{390 | 391} had been entirely within his rights to break the Sabbath, so the pope was entirely within his rights to adjust the law to changing circumstances.

He also insisted, however, that the pope was not quite like Christ. The task of keeping the exercise of power under the control of reason exceeded, not Christ's, but the pope's capacity. Christ was *logos* himself. He knew which circumstances did and which did not justify modifications in the law.[18] He knew when to break the Sabbath and when to accept circumcision. The pope did sometimes, but not always. There was too much that needed to be known, and the dangers at the exposed pinnacle of the ecclesiastical hierarchy, always attracting the attention of the devil, were too great to be braved by one man, even if that man was the vicar of Christ.[19] Hence the pope could not be exempted from the law, and yet the law needed to be revised. How was the law to be kept both flexible enough to respond to changing circumstances and yet firmly rooted in truth and reason?

This was the question that Durant answered with his conciliar proposal.[20] Christ had promised his presence at gatherings in his name. Councils were gatherings in his name. Hence councils could be trusted to supply the divine knowledge that exceeded the grasp of mere mortals but that was necessary to assure the harmony of law with reason even under changing circumstances. It followed that general councils ought to be convoked whenever new laws needed to be made or old laws needed to be modified. In this way the potential split between the letter and the spirit of the law could be avoided and true reason would in fact rule power over all.[21]

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18 "Since Christ, the head and spouse of the universal church, is the truth and the way by which we come to life, we ought to follow the truth rather than wicked customs or the abuses practiced by the church. For reason and truth always exclude mere custom." *Council and Hierarchy*, 223.

19 Ibid., 167–8.

20 "It would be advisable for the commonwealth and the administrators of the commonwealth if their power were to be limited by reason (as has been discussed before) in such a way that [first] the lord pope should no longer use the prerogative of his power without the considered advice of the lords cardinals, nor kings and princes the prerogatives of their power without the advice of other good men (as used to be the practice in the commonwealth in the past), especially when they are making concessions contrary to councils and laws approved in common; and [second] that the pope, kings, and princes, can no longer enact any new laws or grant any new concessions contrary to these councils and laws unless a general council has been convoked, for what touches all must, according to the rule of both canon law and civil law, be approved by all in common." *Council and Hierarchy*, 160; cf. 156–68.

21 For other answers to the same question, see, e.g., Tierney, *Religion*, Kuttner, "Pope Lucius III," and Post, "Vincentius Hispanus."

There is a great deal that could be said about this conciliar deduction, if that is what the few steps by which Durant arrived at his famous demand for the {391 | 392} participation of general councils in all legislative matters of church and state may be called. The most obvious, probably, is that nothing in this deduction justifies the demand for general councils to meet every ten years.[22] It is one thing to ask for the assistance of Christ whenever the rationality of the law is in doubt; it is quite another to ask for his assistance every ten years. Equally striking, perhaps, is the absence of the so-called theory of corporations and a theory of representative government as we understand it. Durant did have such a theory, but it did not make up the foundation of his argument.[23] His argument did have something to do with representation, but it was the representation of Christ, truth, and reason in a council rather than the representation of the people in a constitutional assembly. This, in turn, raises fascinating questions about the relationship between the concept of Christ and the concept of the people in political theory. But in order to determine where Durant's ideas were leading, it may be more fruitful to return to the premises of his argument.

Where, then, did the ideas of William Durant the Younger lead? If you reflect on his premises, you realize that they embody a paradox. On the one hand, he relied on the law as the ultimate standard by which to judge right and wrong. Councils, as important as they were to him, merely played the subsidiary role of helping out where the law was in doubt. On the other hand, however, his very effort to restore the ancient law served to confirm beyond a shadow of a doubt that the law had long since failed to prevent the abuses he would so much have liked to have reformed. The more forgotten ancient laws he unearthed, the more clearly he showed how impotent the law was in the face of forgetfulness. The more urgently he demanded reform, the more exactly he revealed the extent of abuse. The more emphatically he declared the law to contain inviolate principles of justice, the more incontrovertibly he proved that those inviolate principles had in fact been violated. Far from securing a short road to reform, Durant tore up the very ground across which that road was supposed to lead. If there is one overriding lesson to be taken from the *Tractatus maior*, it is that its author expected to reform the church by relying on laws whose failure to prevent abuse he himself had conclusively established. Durant thus fell into a vicious circle.

Now it is true that he recognized the circle and attempted to escape from it. That is the underlying function of his demand for general councils. If Durant's

22 *Council and Hierarchy*, 242–3.

23 Ibid., 280–3, contra the overarching position of Tierney, *Foundations*.

investigations of the ancient laws served mainly to increase the split between the letter and the spirit of the law to desperate proportions, the council was supposed to heal that split. Whenever the law was thrown into doubt, the council was to serve as an independent source of reason through which the law could be restored. This was an entirely workable solution—but only on one {392 | 393} condition: that Christ would indeed be present in the council. What if the split between the letter and the spirit of the law were to infect the proceedings of the council itself? What if the council were to be divided into factions disputing different interpretations of the law? What if the council failed to arrive at a single answer to the question which law was reasonable and which was not? And what if the council were to be ranged against its most eminent member, the pope? These were obvious questions, and they troubled virtually every medieval writer who thought about the issue at all.[24] But merely to raise them was enough to show that the solution advocated by Durant was just as doubtful as the problem it was intended to solve. Merely to consider the possibility that the council itself might suffer from internal strife and fail to reconcile the spirit with the letter of the law was to contemplate the impossibility of reform on the basis that Durant had adopted.

That is, I think, the reason why Durant never addressed the question how to solve an outright conflict between pope and council. That is also the reason why he never demanded a formal right of conciliar consent to the measures of the papacy—a right, in other words, to a form of consent without which papal measures would have been invalid and that the council would have been entitled to withhold at its own discretion. At several places in his treatise he came close to demanding such a right, but every time he stopped short of the line that Gaines Post has clarified by coining the term 'compulsory' or 'procedural' consent—consent that cannot be freely granted or withheld but must be given once a council has been duly convoked and consulted on all matters under consideration, not unlike the kind of consent that is required from participants in a trial.[25]

Once the necessary formalities, such as indictments, pleas, selection of a jury, calling of witnesses, examination of evidence, and so forth, have been fulfilled, plaintiffs and defendants are expected to consent to the decision of the court, whether they like it or not; their consent is not 'voluntary' but 'compulsory.' In very much the same way Durant seems to have considered the council's consent to be bound by the law. He apparently did not consider it within the rights of a duly convoked council to reject measures proposed by

24 See, e.g., Congar, "Quod omnes tangit," and Oakley, "Legitimation by Consent."

25 See Post, "Romano-Canonical Maxim."

the papacy once all procedural resources had been duly exhausted—and one must say 'apparently' because he had nothing explicit to say on the matter, even though it was absolutely crucial and even though one would very much have expected him to say that a council did have the right to refuse its consent to papal {393 | 394} measures if he had thought it possible to insist on any such right.[26] It thus does not appear that his conception of the rights of a council ever equaled that which we associate with the 'voluntary' consent at the disposal of modern representative assemblies.[27]

The conciliar solution that Durant proposed in order to anchor reform securely in the law of the church thus did not solve but merely displaced a problem embedded in his conception of reform itself. Indeed, it may well have increased the problem. For at least by implication Durant raised the possibility that councils themselves might fail to guarantee the kind of authority that he intended to preserve. Implicitly, he raised the possibility that councils convoked in order to heal a split between the letter and the spirit of the law (which was bad enough) might merely aggravate the matter by revealing a split in the ultimate source of divine reason and authority at the disposal of the Christian church (which was intolerable). Durant's ideas were leading him to a conclusion not at all in keeping with his wishes, namely, that reason and power were irreconcilably divided.

There is a sense in which this interpretation of Durant's views flies in the face of his professed intentions and as a matter of fact this is precisely its point. The principles Durant adopted had implications conflicting sharply with the goals that he pursued. His program of reform was stretched uneasily over a conflict buried deeply in the logic of his assumptions. He tried his best to conceal the reality of that conflict, and to some extent he succeeded in keeping it implicit. But since it was embedded in his own convictions, it left clear traces on his thought and actions. One such trace has just been mentioned: his curious abstention from discussing the obvious question what to do if the council disagreed with the pope. Two more can still be added.

One trace of this internal conflict can be found in a brief and virtually self-contained section of the *Tractatus maior* that is entitled "How to Limit the Power of Superiors."[28] This section comes just after Durant has formulated the

26 For a telling exception see Durant's proposals on taxation, *Council and Hierarchy*, 243–6.

27 The assertions made in the preceding paragraph are fraught with many technical difficulties including the interpretation of Durant's Latin prose. For a detailed analysis of the issue and its implications see above, chap. 4. Cf. *Council and Hierarchy*, 163–5 and especially 281–4.

28 *Council and Hierarchy*, 144–56, 218–22.

chief difficulty inherent in relying on the law as the true measure of reform, and just before he offers his conciliar solution to the problem of adjusting old laws to new circumstances. It is the most fascinating stretch of writing in the entire treatise because it moves so very far away from Durant's explicit formulation of the problem and the solution that he was about to offer, even though it is {394 | 395} placed right between the two. It begins with the most emphatic demands that the power of the pope must be subjected to reason, continues with a uniquely detailed passage on the virtues of the ancient Roman republic, culminates in a pained exclamation over the distance separating contemporary Christian vices from ancient pagan virtues, invokes the wrath of God on unjust rulers, and ends with abject entreaties to the pope to impose the law upon himself.

The tone and substance of these passages is strikingly different from the rest of the treatise. At the end there is no longer even the slightest hint that the papacy could be subjected to law and reason by any other means than its own good will. Durant starts out by asserting the power of reason, but instead of demonstrating how reason could be brought to bear on the papacy, he ends up by throwing himself and his entire program of reform, including its legal foundations, on impotent threats of divine vengeance and the faint hope that the pope may of his own free will do what Durant would have liked him to do. Precisely where he invokes the obligations of Christian government most urgently, Durant turns to the virtues of pagan antiquity. Precisely where he states his desire to identify the ancient law with reason most explicitly—and I think because this is where he does state it most explicitly—the link joining the ancient law to reason breaks apart.

This left Durant with the possibility that ancient Christian virtues might have been lost forever, that the virtues of Christians and pagans might have become comparable, and that the ancient law of the church might henceforth belong in the domain, not of reform, but of history—a form of history not yet perhaps exactly as value-neutral as history has reportedly come to be in the research of modern historians, but surely neither any longer a source of moral obligation as direct as his program for reform required it to be. It followed, and Durant almost admitted as much, that there was not much else to do than to relinquish contemporary affairs to the power of a ruler whom one could beg, but not require, to obey the law because the decision what is law could no longer be derived from any other source than from that ruler's own discretion. It followed, in other words, that the supremely rational power of the law by which Durant thought the power of rulers could be bound in order to promote the reform of the church had, under the stress of his very own insistence,

broken apart into two uneven pieces: a supreme power that was irrational (which we have learned to call sovereignty) and a form of rationality that was powerless (which we have learned to call history).[29] {395 | 396}

There is a logic to the sequence of steps that Durant took in the section on limiting the power of superiors. It is a logic that caused him the greatest anguish, but it is also a logic that followed directly from the urgency with which he admonished his contemporaries to heed "the original texts."[30] It drove him to acknowledge the impotence of those texts and his own inability to make the present conform to what the original texts demanded. It transformed those texts from authorities into sources of historical knowledge about a past that was both ideal and irretrievably lost. It forced him to countenance the disintegration of the universal order that he was struggling so painfully hard to preserve—an order moral, rational, legal, and powerful all in one—into mere evidence of how things used to be, with no binding moral claims upon the present, and the arbitrary power of a sovereign ruler bound by no precedent or law besides his own interpretation of the law of nature and of God. Whether or not that sovereign was to be found in representative assemblies or monarchies was a subsidiary question. In neither case were sovereigns going to accept submission to that ancient law on whose divinely inspired authority Durant had rested his case. Here, in other words, the conciliarist was about to change his mind. Having started out by demanding a return to the ancient laws, he ended up by facing the possibility that the only return to the ancient laws within his grasp was the historical study of 'the original texts' because 'the power of superiors' had successfully escaped from his attempt to subject it to the reason of those texts. Here the conciliarist anticipated the early modern division of labor between humanists and politiques, between history and reason of state, that

29 Ibid., 265–7, 275–6. For an old, but still marvelously lucid general perspective on the 'historical revolt' from a characteristically medieval faith in the rationality of the world to a characteristically modern, and historicist, form of 'irrationality,' see Whitehead, *Science and the Modern World*, 12–16, esp. 16: "Science has never shaken off the impress of its origin in the historical revolt of the later Renaissance. It has remained predominantly an anti-rationalistic movement, based upon a naïve faith. . . . Of course the historical revolt was fully justified. . . . It was a very sensible reaction; but it was not a protest on behalf of reason."

30 Anticipating humanist sentiments, Durant repeatedly expressed his contempt for "the diversity and variety of glosses and writings in each of the [university] faculties. They stultify the intelligence of students with multiplicity, prolixity, and similitude. They are a waste of time and money and they produce confusion and ignorance because they lead to contempt for the original texts." *Council and Hierarchy*, 126–7.

came to fruition in the writings of Jean Bodin and his successors. And by anticipating it he helped to bring it to reality.[31]

A second additional trace of the internal conflict in question has to do with Durant's later actions. It was because of the logic of his own argument, and not merely out of craven submission to superior force or self-interested political expedience (though certainly not in conflict with them either), that Durant so quickly modified his ideas at the Council of Vienne when he encountered opposition from the curia and from Pope Clement V.[32] What had merely been a (very {396 | 397} unwelcome) logical possibility thus became a (relatively painless, but not much more welcome) course of action just as soon as Durant experienced the conflict between reason and 'the power of superiors' in his own person. Of course it was the conciliar proposal that went. What remained in the *Tractatus minor*, and what was in fact enhanced, were the proposals for educating the clergy that came to fruition at the Council of Trent.[33] What remained in Durant's own life was a diplomatic career in royal and papal service which declined only under the pontificate of Pope John XXII and ended in Nicosia in 1330, whence he had just returned from Egypt in an attempt to further the crusade—surely a fitting end to the career of someone as firmly dedicated to the universal rationality of the law as William Durant the Younger.[34]

That was where his ideas were leading William Durant the Younger. What is their significance for our understanding of conciliar thinking overall? Let me offer an answer in three parts. First, Durant's ideas help to identify the fundamental issue in the history of the conciliar theory. That issue was not the choice between monarchy and representative government, nor the choice between pope and council. It was rather the question how to balance the needs of the present against the weight of the past. It was how to reconcile contemporary experience with a hallowed textual tradition without allowing the one to predominate at the expense of the other. It was, in other and more familiar terms, the question of reform. Reform is the fundamental category of the framework in which the conciliar theory and the conciliar movement took shape and by which they were determined—a framework that had been constitutive for the self-understanding of the medieval church ever since the times of Pope Gregory VII and Gratian at the latest. Conciliarists may have turned reform against the papacy, but only because in their view the papacy had failed to

31 For a detailed justification of this interpretation of Durant's section on "How to Limit the Power of Superiors" see *Council and Hierarchy*, 247–84, 317–18.

32 Ibid., 283–4, 290–304.

33 On this connection see Bellone, "Cultura e studi." Cf. *Council and Hierarchy*, 301–3.

34 Ibid., 305–14.

reach the goals that had been set in the eleventh century and not because the goals themselves were wrong. That explains why the logic of Durant's conciliar program, including its non-conciliar outcome, can be traced back to a crucial canon in Gratian's *Decretum*.[35] This is of course not to say that the great debate over the respective constitutional rights of the council and the pope did not have the importance for later constitutional thought that historians now attribute to it. But it is to say that it acquires its proper meaning only within the limits established by the framework of reform.

Second, Durant's ideas help to clarify the nature of the conciliar theory. Paradoxically, at least to modern ears, it was a theory not only of freedom, but {397 | 398} also of obedience. "Obedience," Durant declared in the very opening lines of his treatise, quoting the prophet Samuel and Pope Gregory I, to whose thinking Durant was heavily indebted, "obedience is better than sacrifice because sacrifice is performed with the flesh of another, whereas obedience is a sacrifice of ourselves."[36] In Durant's view councils were the place where that sacrifice of our selves could be properly performed. There, with the assistance of Christ, due obedience could be rendered to the ancient law and the reason that it embodied without disrespect either to the past or to the present. It was by such a sacrifice that Durant expected to be able to heal the split between the letter and the spirit of the law that threatened to undermine the foundations of the church and to hasten the apocalypse. If the conciliar theory was meant to secure freedom, it was at least in part the freedom to obey.

Walter Ullmann has written that the conciliarists

> had not the courage of their conviction to transplant their own theories into reality. It was the amorphous multitude which first frightened them and then made them abandon their own position, only to retreat into the old papal-monarchic framework. Indeed, it was fear of the multitude—of the laity—which made the conciliarists join the 'Establishment' in which they found a secure bulwark against the rising tide of popular forces.[37]

If my interpretation has any merit, that is both unfair and misleading. It was not that the conciliarists lacked the courage of their conviction, but rather that their conviction included obedience. It may be difficult for modern interpreters

35 Not, as one might have thought, D. 40 c. 6, but D. 20 c. 3; see *Council and Hierarchy*, 157–8, 267–75.

36 Ibid., 116–17.

37 Ullmann, *History of Political Thought*, 224.

to appreciate the kind of virtue conciliarists were able to find in obedience, unless they share the Kantian perspective that freedom consists of obedience to reason, but a virtue it was most certainly thought to be. It is difficult to believe that the obedience praised by Durant did not serve as one of the sources from which modern sovereigns have drawn their claims on a right to demand unconditional obedience from their subjects.

Third and finally, Durant's ideas help to understand why the conciliar movement ended as it did. The trajectory of his thought and life paralleled that of the conciliar movement overall. To put the same point in the terms alluded to at the beginning of this article, Durant and the conciliar movement shared common formal and final causes. Both started with an attempt to maintain the authority of the church and its law, both founded themselves on the rationality of the church and its law, and both ended in a victory for history and sovereignty, i.e., {398 | 399} for a return to the past that has no morally or legally binding implications for the present and for a kind of authority that is exempt from law. In the case of Durant, that victory came when Pope Clement V took him to task, and he abandoned his conciliar proposal. In the case of the conciliar movement, that victory came when Pope Eugenius IV faced down the Council of Basel, and leading conciliarists such as Cesarini and Nicholas of Cusa took his side while welcoming the humanist study of the past. In the end the conciliar movement found it just as impossible to prevail in an outright conflict between pope and council without forsaking its principles as Durant had found it to be. What began as a mere logical possibility became a historical force that changed both minds and the course of events just as soon as concrete experience forced conciliarists to address the direct conflict between pope and council that Durant had hoped to avoid by silence. Durant's ideas, in other words, illuminate a road that led from the assertion of conciliar principles to the acceptance of princely sovereignty, not in spite of the demand for general councils, but because of it.

That road was not at all the only one he could have traveled. There is no reason to believe that ancient law cannot be duly balanced against contemporary circumstances. Nor is there any reason to believe that reason itself cannot change in accord with the demands of time and place. But there is reason to believe that the balance will inevitably contain an element of irrationality. To try and do away with that irrational remainder is merely to increase its strength. That, I think, is precisely what William Durant the Younger did and what was repeated in the conciliar movement overall. Both sought after a solution to the problems confronting the church in the later Middle Ages with no irrational remainder. Both wanted to get to the bottom of things. But in their

eagerness to keep authority intact they overshot the mark. Far from arriving at the desired goal, they were driven into the corner defined by the question "Council or Pope?" There was no way out of that corner without changing the terms of the debate. The very attempt to get to the rational bottom of the problem of reform destroyed the foundation for its conciliar solution.

The sequel is well known. It was adumbrated in Durant's own writing and repeatedly enacted and re-enacted by those late medieval canonists who turned from striving for conciliar reform to humanist studies and an acceptance of the kind of papacy epitomized by men such as Alexander VI, Julius II, and Leo X.[38] It was driven even further by their Protestant successors who rejected the very concept of the rational authority of law as a foundation for the church, sharpened the distinction between faith and law to a point where the relation between the two became well-nigh unintelligible, and softened the distinction {399 | 400} between legitimate rulers and tyrants to a point where the difference between the two became hard to tell. Jean Bodin was merely consistent when he went so far as to declare a tyrant ruling without consent as a sovereign properly speaking, while denying sovereignty to certain magistrates ruling with consent, precisely because they were ruling with consent.[39] In Bodin's thought the medieval hatred for tyranny had been superseded by an entirely novel respect for a kind of public authority that transcended the legal distinction between tyrants and legitimate rulers.

By transforming the concept of reform into that of the Reformation, Protestants opened a new epoch in the history of Europe. As a result the obedience that Durant had wished for was irreversibly divided into two varieties: the humanistic one, still practiced by modern historians, that continues to heed the commands of ancient law but which has voided them of their obligatory power and limited itself to studying the original texts without demanding any

38 A book about conciliar canonists turning to humanist studies is still waiting to be written.

39 "I would add that if a sovereign magistrate, whose term is only annual or is for a fixed and limited time, contrives to prolong the power entrusted to him, it must either be by tacit consent [*de gré à gré*] or by force. If by force, it is called a tyranny. Yet the tyrant is nonetheless a sovereign, just as the violent possession of a robber is true and natural possession even if against the law, and those who had it previously are dispossessed [*en sont dessaisis*]. But if a magistrate prolongs sovereign power by tacit consent, I say that he is not a sovereign prince, since he has nothing except by sufferance, and all the less so if no time limit is set, for then he has only a precarious commission [*commission précaire*]." Bodin, *On Sovereignty* 1.8, ed. Franklin, 6. See also below, pp. 456–8, 482–7.

action; and the obedience of the modern subject, who heeds the commands of a sovereign ruler and is asked to obey them blindly because the sovereign is absolute and his reasoning is a secret of state. Historicism and absolutism are the price that modernity has paid in compensation for the medieval dream of a perfectly rational constitutionalism.

Obviously this view of things depends on a definite interpretation, not only of the ideas of William Durant the Younger, but also of the conciliar movement as a whole, not to mention a host of other things. I am well aware that the interpretation of the conciliar movement remains contested. I am even better aware that I assume, instead of proving, the extent to which Durant and the conciliar fathers at Constance and Basel were inspired by a similar respect for the authority and rationality of law. There are good reasons to believe they were, but the question is wide open.[40] Far be it from me, therefore, to consider the matter settled, but in conclusion I would like to specify a potential benefit of this interpretation. {400 | 401}

If it is true that there is a correlation between the demand for regular meetings of general councils as a means to curtail the power of the papacy and the disintegration of a unified concept of rational authority into historicism and absolutism, then that disintegration ought to have been most advanced in places where the conciliar movement flourished, and least advanced in places where it did not. This, it seems to me, is precisely the lesson taught by the different national histories of Europe. Germany and France were the countries most hospitable to historicism and absolutism. They were also the countries most hospitable to the conciliar movement. The councils of Lyon and Vienne, well before the conciliar movement got underway, but when the call for church reform was already beginning to turn against the papacy, are the only ecumenical councils that met in France, and the councils of Constance and Basel, the two most important councils at which conciliarist convictions were given legal and political expression, are the only ecumenical councils to have met on 'German' soil. Conciliarists were born in many different places, but they went to France and Germany.

Perhaps one could go even further and say that in the German-speaking lands where the councils of Constance and Basel actually met the disintegration of rational authority was experienced at its most concrete. Germany went on not only to produce the Reformation—a revolutionary transformation of the concept of reform that involved a frontal assault on the authority of law

40 Cf. Pascoe, *Jean Gerson*. {See now Stump, *Reforms*.}

if anything ever did—but also to implicate itself in erudite historicism too deeply to be able to conduct contemporary politics except in the disjointed and disorganized territorial way which characterized the Holy Roman Empire in early modern times and has gone on to characterize Germany until the present.[41]

France, on the other hand, was the country that housed the single most important intellectual home of conciliar theorists, the University of Paris. In France the failure of rational authority was perhaps experienced less sharply, or at any rate so differently that historicism took second place to absolutism. Attachment to universal causes was transformed into attachment to the greatness of the French monarchy and nation, allowing France to specialize in building the classic model of absolutist sovereignty and encouraging the French to practice a variety of rationality equally absolutist as, but less historicist than, the German. By the nineteenth century diplomatic negotiations were just as naturally conducted in French as the great works of historicism were written in German.

Italy and England, by contrast, did not appear as prominently on the scene of the conciliar movement as Germany and France. Neither did they experience {401 | 402} the split between past and present equally sharply, suffer internal disruptions as violent as the Thirty Years War or the Wars of Religion, or embrace absolute sovereignty with the same enthusiasm. These are the countries in which Renaissance had more resonance than Reformation. That may help to understand why no country managed more successfully to integrate princely sovereignty with scholarly Humanism than Italy, and why the ideals to which the conciliar movement aspired have nowhere been translated more effectively into a national setting than in England.[42] Perhaps it may even explain why it was an Englishman equally at ease with the study of history as with the life of a statesman who would, at a much later time, but in the very same context of fundamental legal reform, strike the balance between past and present that seems to have eluded the conciliar movement in one of the clearest formulations imaginable:

41 On this characterization see Leonard Krieger's classic *German Idea of Freedom*, as well as Hammerstein, *Jus und Historie*.

42 On Italy see Cochrane, *Italy*, esp. 55–66, 202–5, 248–50. On England, see Oakley, " 'Anxieties of Influence," esp. 84–5.

> It is now time for us to pay a decent, a rational, a manly reverence to our ancestors, not by superstitiously adhering to what they, in other circumstances, did, but by doing what they, in our circumstances, would have done.[43]

From somewhat unexpected quarters J. G. A. Pocock's thesis about a republican tradition in political thought bypassing Germany and France while linking Italy to England may thus receive some confirmation.

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43 Macaulay, "Speech on Parliamentary Reform," 47.

PART TWO

Moving On: Hermann Conring (1606–81)

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CHAPTER 8

Conring on History

> Even though I do not believe that everyone can be bent to the circle of reason, and my efforts suffice to excite only better minds, nevertheless I judge it to be my duty to inculcate again and again what is to the advantage of the commonwealth.
>
> Opinion is a sacred disease. But nothing rules this world as much as it.[1]

For a long time the intellectual history of seventeenth-century Germany has been neglected. The reasons why this should be so are not hard to understand. With one generally acknowledged exception, namely Leibniz, famous thinkers like Luther, Kant, and Lessing seem to have avoided life in the seventeenth century, and those who did not, like Descartes, Hobbes, and Newton, preferred to be born outside of Germany. On the face of it, the cultural landscape of Germany in the period between the {563 | 564} Reformation and the Enlightenment thus appears barren.[2] But there are reasons to doubt such an impression. The cultural efflorescence of the eighteenth century seems to presuppose a period of growth, subterranean growth perhaps, but nevertheless something different from the aridity usually ascribed to the terrain. Perhaps the presumed infertility of the seventeenth century is merely an optical illusion created by an unconscious but concerted effort of a later age to forget a debt it owed its forbears.

This is not the place to settle the question whether or not the prevailing opinion is correct. It has merely been brought up in order to establish the context in which the present study should be seen.[3] Its focus is narrow: it is limited

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1 "Etsi . . . haud existimem posse omnes in rationis gyrum flecti, et vel illa mea sufficiant meliori menti excitandae, nihilominus officii mei esse iudico itemtidem inculcare, quod reipublicae est commodum." Conring, *Opera*, 5:256 lines 59–61. "Sacer scilicet morbus opinio est: mundus tamen hic nulla perinde re quam hac ipsa regitur." *Opera*, 5:262 line 51.

2 For a typical view, see Hajo Holborn's assessment of the effects of the Thirty Years War on German civilization in his *History of Modern Germany*, 2:123.

3 The time for reexamining the seventeenth century from such a point of view seems to be ripe. In recent years scholars in growing numbers have devoted their attention to that part of

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to a single individual, to a particular aspect of his thought, and it makes no claim to treat even that aspect exhaustively. Still, there are good reasons to hope that it can make a contribution which at least by implication has more than limited significance.

Hermann Conring was born in 1606 and died in 1681. His professional life was spent teaching and writing at the University of Helmstedt, where he came to be the dominant figure. In its time, Helmstedt was a premier institution of higher learning in Protestant, perhaps in all of Germany. He thus takes a commanding place at the center of our subject, and it is reasonable to suppose that an understanding of his thought may shed light on the transformations which resulted in the Enlightenment.[4]

At present no such understanding exists. To be sure, there is a small body of scholarly literature devoted to him. But it is easy to show that his reputation is subject to a kind of illusion similar to the one alluded {564 | 565} to above. This is no slight on the historians concerned but a testimony to the power of tradition. Conring is best remembered for three achievements: as a path-breaking historian of German law, a political thinker of note, and an early proponent of systematic *Quellenkritik*.[5] Memory is right to point to those aspects of his work that have withstood the test of time particularly well. Perhaps, for that reason, they are indeed the most significant. But memory fails to give a faithful picture of his work as a whole. Many of his writings were dedicated to medicine, natural philosophy, theology, and moral theory, to mention only the broadest possible categories in which his other interests can be organized.[6] By giving a place of honor to three particular achievements and forgetting the rest, existing treatments of his thought cannot do it justice. They seem rather to reflect the prejudices and specialized interests of later ages: the eighteenth

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the history of Germany. Since references to the secondary literature have been kept to an absolute minimum, the names of Michael Stolleis, Horst Dreitzel, Arno Seifert, and Notker Hammerstein, whose work is most closely related to the topic of this article, as well as those of James Vann, Marc Raeff, Robert Birely, and the many publications sponsored by the Herzog August Bibliothek in Wolfenbüttel may stand in place of a fuller bibliography. Much more guidance than the title suggests can be found in Scupin and Scheuner, eds., *Althusius-Bibliographie*. For more recent information, see the *Zeitschrift für historische Forschung*, esp. Dreitzel, "Entwicklung der Historie."

4 Willoweit, "Hermann Conring," and the contributions to Stolleis, ed., *Hermann Conring (1606–1681)*, have recently established a new basis for all future work on Hermann Conring. The older literature can be found through these works. Hammerstein, "Historie bei Conring," approaches our subject in a different manner.

5 Cf. Willoweit, "Hermann Conring," 129.

6 See the bibliography of Conring's published writings in Kelly and Stolleis, "Hermann Conring: Gedruckte Werke."

century's disdain for Aristotle, the nineteenth century's preoccupation with the history of laws and constitutions, and the specialization of the historiography of our own time.

There seems to be agreement among students of Conring's works today that no real understanding of the conceptual framework uniting his thought exists and that this situation deserves to be remedied.[7] But there is no agreement how to do it. Given the sheer mass of his writings, amounting to more than six thousand folio pages in the standard edition, not to mention his voluminous unpublished correspondence, it is obviously necessary to build up understanding gradually. Yet to begin by studying Conring's concept of history might seem to some a questionable proceeding. Chronologically, and perhaps intellectually as well, Conring was a doctor of medicine first. One needs merely to remember how important biology is for an understanding of the thought of Aristotle—that physician's son whose philosophy exercised so formative an influence on Conring's mind—in order to suspect that Conring's medical writings hold important, possibly the most important, clues. But the concept of history with which we are here concerned was not what it is today. In the sense in which it was {565 | 566} employed by the professor from Helmstedt, history, as will quickly become apparent, is central to a theory of all knowledge, and not only the knowledge of human affairs. A look at his thoughts about history may thus not be the only way to begin, but it does promise to lead to the comprehensive understanding we are seeking.

The best place to look for his definition of what history was, how it should be pursued, and what purposes it served are the three prefaces with which he introduced his editions of Tacitus's *Germania*.[8] The argument is set forth in full in the first of them, the preface to the edition of 1635. At the time he was but twenty-nine years old, looking forward to more than four decades of prolific scholarly production. Fortunately for our enterprise, the later prefaces demonstrate that he continued to believe what he had written as a young man. To be sure, in the second preface, for the edition of 1652, he mentioned that parts of the first might deserve revision. But he decided against making any changes, not only because of the praise that he had received since 1635, as he was obviously proud to report, but also because

7 See for example Willoweit, "Hermann Conring," 129, and Hammerstein, "Historie bei Conring," 217.

8 *Opera*, 5:253–78. Cf. the judgment of Hammerstein, "Historie bei Conring," 222–3. Among the considerable literature on the reception of Tacitus, Etter, *Tacitus in der Geistesgeschichte*, Schellhase, *Tacitus in Renaissance Political Thought*, and Ridé's massive three volumes on *L'image du Germain* may be mentioned. See also the article on Tacitus by Ulery, "Cornelius Tacitus."

> it may not be proper to balance the labors of youth on the scales of a more exacting age, and every blot that may be there should be left to its own times, so long as it does not bring on too much discredit. And thus there is no reason why I should alter anything.[9]

This sentiment is subtle evidence for a remarkable sensitivity towards the autonomy of the past, one's own included. It also means that whatever changes he may have contemplated in 1652 can hardly have touched on the substance of his views.

The third and last preface was published in 1678, three years before his death. It contains the motto for this essay and thus confirms the continuity in his thought.[10] Far from considering the desirability of any {566 | 567} changes, he rather underlined his commitment to the original preface with that characteristic shift to a slightly stubborn bluntness which is one of the privileges of age. The text also nicely illustrates the qualities that were blended in his personality: scholarship and service to the common good, reason and piety, a sense of lonely melancholy issuing from having to disagree with the majority of men, and pride in belonging to those of "better minds."

Conring begins his account of history with a eulogy of the pleasure it provides.

> Whoever denies that the highest pleasure can be obtained from histories . . . assuredly has either never read or heard of them, or he is utterly stupid and his mind not stirred by any pure and liberal emotions.[11]

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9 "Ipsemet ego nonnulla quidem paulo aliter scripta malim: sed fortassis haud fas est, iuvenilem laborem omnem exactioris aetatis trutina expendere, et singulis temporibus suus aliquis naevus relinquendus est, modo non nimium dedecoret: ac proinde non est cur quidquam mutem." *Opera*, 5:278 lines 17–20.

10 The relevant text in full: "Finem denique huic libro imposuimus repetita editione nonnullorum, quae ipsimet de usu peritiae veteris Germaniae status iampridem fuimus commentati. Nec vero nos fugit, quam haec omnia a paucis suo pretio aestimentur, imo quam haec a plerisque soleant contemni. Etsi enim haud existimem posse omnes in rationis gyrum flecti, et vel illa mea sufficiant meliori menti excitandae, nihilominus officii mei esse iudico itemtidem inculcare, quod reipublicae est commodum. Perinde atque nunquam omitti debent seriae ad pietatis cultum invitationes, etsi pauci velint arctam illam semitam ambulare. In iis autem, quae iam ante hosce quadraginta tres annos fui praefatus, non hoc tantum docui, sed etiam de universae historiae usu, et cumprimis de notitia reipublicae imperii Germanici, undenam sit petenda, prolixius disserere fui coactus, quia vulgo tunc temporis plane alia erant persuasa magno cum publico damno." *Opera*, 5:256 line 57–257 line 4.

11 "Voluptatem summam ex historiis qui negat capi . . . nae ille aut numquam eas legit vel audivit, aut vero excors est nec sincero ac liberali quodam animi affectu commovetur." *Opera*, 5:257 lines 25–7.

This is more than just a rhetorical topos[12] because there is a reason why history is so extraordinarily pleasurable:

> Apart from the fact that the common people know it only by experience, philosophers are not unaware of the cause of that delight. Seeing that we human beings are evidently born with a desire to know, a desire which may be either fulfilled by external instruments of the senses or by a hidden working of the mind, history is a wonderful compendium of someone else's knowledge, a guide to someone else, as it were.[13]

History thus pleases because it fulfills a natural desire for knowledge. The pleasure it yields is like that which is produced when one obtains {567 | 568} knowledge for oneself either through empirical observation or by rational contemplation. Yet it is also different, because it is "a wonderful compendium of someone else's knowledge." It enables seekers after knowledge to extend the limits which nature imposed on their desire. What one might therefore call its preternatural function is why it pleases so preeminently.

The significance of these opening remarks is not merely that they justify the praise of history which Conring had chosen in order to open his treatise in the properly rhetorical vein. It is rather that they establish a definition of history that fits squarely into a general theory of knowledge. He goes on to describe that theory more precisely:

> Beyond the one mentioned so far, there is another and nobler reason for history's charm. For all of the sciences and arts require as much experience of things as possible—excepting only the mathematical ones, which are called pure—and without such experience none of them can be acquired. History thus becomes a matter of the highest necessity inasmuch as it displays a broad grasp of every kind of experience. . . . History thus is a guide of the stricter sciences and yields as much delight as any of the sciences and arts bestow. But to reap this pleasure and this fruit of history is not for everyone. It is granted only to those who either know by their own ingenuity how to construct common laws and universal

12 Hammerstein, "Historie bei Conring," 220n6, with reference to Curtius, *Europäische Literatur*, 340.

13 "Praeterquam enim quod vulgus experimento id habeat cognitum, causam eius delectationis philosophi viri non ignorant. Quum nimirum hominibus nobis ingenitum sit sciendi desiderium, idque vel externis sensuum instrumentis vel arcana mentis agitatione expleatur, alterius notitiae mirum est compendium historia, alterius quasi manuductor." *Opera*, 5:257 lines 31–4.

> precepts from individual events, or at least have learned them from masters to the degree that nothing except experiments is required for an absolute knowledge of things in every detail.[14]

Conring thus affirms a fundamental distinction between experience on the one hand and "common laws and universal precepts" on the other. The latter are constructed out of the former. Knowledge properly speaking only exists where experience and rational principles are united. The {568 | 569} term he prefers for such knowledge is *scientia*.[15] When it is necessary to distinguish it from subordinate kinds of knowledge, consisting of mere familiarity with the empirical data without rational understanding on the one hand, or pure awareness of rational principles without empirical confirmation on the other, he may also speak of *absoluta scientia*, or *absoluta eruditio*.[16] At any rate he never tires of pointing out that 'to know' means to be able to explain the phenomena, and 'to be able to explain' means to know the reasons and understand the causes behind them.[17] His favorite illustration is the example of a doctor: unless he knows both the actual condition of Socrates's body and the science of medicine, he cannot properly be said to know whether Socrates is healthy or not.[18]

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14 "Est vero praeter illam et alia nobiliorque amoenitatis istius causa. Quum enim scientiae atque artes omnes, solas si mathematicas, quas puras vocant, exceperis, experientia rerum ut quam maxime indigeant, neque sine hac ullam earum liceat assequi, hinc iam necessitas etiam summa historiae oritur, veluti quae exhibeat complexum aliquem experientiae cuiuslibet generis. . . . Manuductrix igitur severiorum scientiarum est historia, tantumque parit delectationis quantum scientiae atque artes quaelibet largiuntur. Sed hanc eius voluptatem atque hunc illius fructum percipere non est cuiusvis. Tantum enim iis id concessum est, qui communes leges atque praecepta universalia aut ipsimet suopte ingenio norunt construere ex singularibus eventis, aut vero a magistris hactenus ea didicerunt, ut ad absolutam omnibus numeris rerum scientiam nil praeter experimenta postuletur." *Opera*, 5:258 lines 1–14.

15 But note that for Conring, as for his teacher Aristotle, *ars* and *scientia* are both knowledge, the difference being only that *ars* is knowledge which can be used for practical purposes.

16 See the texts quoted in notes 14 and 42.

17 "Atque nobis quidem id paucis expeditum dare animus est; prius tamen in memoriam revocandum fuerit, ad eiusmodi aliquam scientiam non eventorum duntaxat aut aperte gestorum sed et causarum latentium notitiam pertinere. Habet videlicet et heic suum aliquem locum Aristotelis illud: *scire esse rem per causam cognoscere*." *Opera*, 5:264 lines 30–3. Cf. *Opera*, 5:258 lines 14–19, 259 lines 13–15.

18 "Tum vero demum credimur medici naturam omnem nostri Socratis perspexisse, quum didicimus omne illud, quod in eo est sive sanum sive morbidum sive ambiguae inter haec conditionis: id quod est, nosse originem atque causas omnium illorum, quae ad valetudinem

With a few words Conring has thus established a basic definition of history: history is a record of experience, any kind of experience. "For whatever the senses have perceived, whether things of nature or human affairs, history puts them all before [our] eyes."[19] It is one of the two basic ingredients in knowledge. Universal laws and principles are the other.

Three important consequences must be noted. First, the equation between history and experience gives the concept of history a much wider connotation than it has today. Its subject matter, in fact, is universal. It includes not only phenomena in the realm of human affairs but everything that is subject to empirical observation. One way of putting this is to {569 | 570} say that there is not merely one history, but as many kinds of history as there are kinds of empirical data.

> It is wonderful how much light that history which corresponds to each branch of learning brings to it, as natural history does to the natural philosopher, heavenly to the astronomer, political to the political thinker, medical to the doctor, and to each his own.[20]

The only exception to this scheme, as was observed in the quotation above, are the 'pure' sciences, such as mathematics. As they have nothing to do with empirical data at all they leave no room for history.

Second, even though the meaning of history is so wide, it does not extend to knowledge properly speaking. History is merely a prerequisite for knowledge. There may be a strong temptation to consider this as proof that Conring shared with modern historians the conviction that human affairs are not susceptible of scientific explanation. But unless one were to maintain that his concept of science was identical to the modern one, that would be a mistake. He certainly

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Socratis quoquo modo pertinent. Non enim satis est scire, quam ille naturam materno ex utero produxerit, aut quantum ab illa post recessum sit, quidque pristino etiamnum sese modo habeat: sed et causas affectuum omnium, sive illi secundum sive praeter naturam sese habeant, oportet notas esse: ut pateat, quidnam corrigi queat aut respuat medelam. Simili prorsus ratione igitur rerum imperii vere consultum decuerit non scire tantum quasnam in leges illud consenserit, (quod pene geminum est conditioni nativae Socratis) aut vero, quantum iis hodierni mores vel adversentur vel congruant: sed et origo occasioque et legum latarum et eorum quae contra fiunt, intelligenda est." *Opera*, 5:263 lines 10–20; cf. *Opera*, 5:258 lines 48–9, 260 lines 1–12, 262 line 61–263 line 10, 266 lines 49–54.

19 "Quaecunque enim sensus percipiunt, sive illae res sint naturae sive negotia humana, isthaec omnia exponit oculis historia." *Opera*, 5:257 lines 35–6.

20 "Igitur mirum est, quantum adferat lucis doctrinae cuilibet ea, quae illi respondet, historia: ceu naturali philosopho naturalis, astronomo coelestis, civili civilis, medica medico, singulis sua." *Opera*, 5:258 lines 7–9.

considered history 'unscientific,' but only because by definition it had to be distinguished from rational principles. That is no reason to believe that he denied the existence of rational principles by which experiences in the realm of human affairs could be 'scientifically' explained.

It is, in fact, not difficult to show that he conceived of the study of human affairs as a science in precisely the same terms as those he had set forth for *absoluta scientia* in general. Its ingredients are explicitly discussed in his account of what is required for the study of the history of Germany.[21] On the one hand, there are the empirical data: they consist of "what has been done and decreed" and are found in the various kinds of histories.[22] Because of his overriding interest in the commonwealth, that is, the Empire, he usually concentrates on facts related to political history. But on occasion he stresses that there is more to human affairs than that. In the third preface he expressed a clear preference for documents describing "the lands, the customs, the commonwealth, and the differences between the various peoples," rather than tales of war and battle.[23] {570 | 571}

On the other hand, the study of the history of Germany also presupposes a knowledge of "common laws and universal precepts." They are taught by several disciplines, all of which belong in the sphere of practical philosophy. The most important among them is *civilis prudentia*, corresponding roughly to 'political science' in English, but best left untranslated and rendered as 'civil prudence.'[24] In addition to civil prudence, the historical scientist must also know natural law and morals.[25] In order to appreciate in full the kind of think-

21 *Opera*, 5:264 line 26–265 line 17.

22 "Est autem hoc, scire quid actum aut decretum aliquando sit in reipublicae nostrae, adeoque imperii huius Romani, quod appellamus, negotiis." *Opera*, 5:265 lines 9–11.

23 "Illa igitur duntaxat hic congesta sunt monumenta, quae terras, mores, rempublicam et populorum varia discrimina recensent, suntque adeo reliquis omnibus hactenus praeferenda." *Opera*, 5:254 lines 28–30.

24 *Opera*, 5:264 lines 26–50.

25 "Praeter hanc vero, etiam morum iurisque naturalis prudentiam recte eumdem ob finem requiri, haud difficile iudicatu est. Intelligo autem illam scientiam quae, quemadmodum vitam suam homo cum erga semetipsum, tum erga alios, maxime vero erga Deum (nam et hoc iustitiae opus est) debeat gerere exponit; omnia enim haec artis unius sunt, si intra connata menti nostrae praecepta maneamus, licet hodie varias sit in partes docentium consuetudine discerpta. . . . Quur enim ita sentiamus, in promptu est docere. Quoniam nimirum sapientia civilis, quod alias probatur, fundamenti loco religionis, iuris, morumque omnium prudentiam habet, super quam sua magnam partem exstruat atque aedificet; eadem profecto necessitate ad hanc addiscendam astringitur historicae illius nostrae affectator scientiae, qua tenetur prudentiam civilem sibi comparare." *Opera*, 5:264 lines 51–61.

ing which is here at issue, one must emphasize that this includes another kind of general principle.

> Perhaps there are good grounds indeed to expect such a historian, or someone who is trying to walk this road towards history, to have a profound knowledge of revealed Christian doctrine.[26]

The reason is that religion, along with natural law and morals, is the basis of all prudence. Conring insisted on the essential unity of these disciplines and deplored the didactic customs by which they were torn apart.[27]

Conring in other words had a well-developed concept of a science of human affairs, exactly parallel in its structure to science in general. It should be noted that there is a terminological difficulty in referring to it. 'History' cannot really be used because it has already been defined as the record of empirical data of any kind. It is doubly confusing to use the same term to refer to a science, rather than to the facts it explains, and to restrict it to human affairs. But since no other term is available, confusion can hardly be avoided altogether. Conring himself clearly did not use history only in the strict sense that he gave to it in his systematic introduction. Thus the best one can do is to speak of 'historical science,' and defend {571 | 572} this combination by pointing out that, even though according to his own conceptual scheme this is almost an oxymoron, Conring himself used it at least once.[28]

This concept of a science of history also deserves to be stressed because of the gulf that has since come to separate history from science. It focuses attention, not only on Conring's view of the nature of the study of human affairs, but on his understanding of science in general. There can be no doubt that to give the distinction between an 'unscientific' knowledge of human affairs and a 'scientific' knowledge of the realm of nature the same importance it has in modern thought is to misrepresent his convictions. In the last analysis it may be necessary to qualify the basic pattern. But it first needs to be stressed that in his mind all of the 'arts and sciences,' including the study of human affairs, had an identical structure.

The third, and by far the most important, consequence derives from a prominent characteristic of history. History is after all not simply experience, but experience recorded by others. It can therefore not be taken at face value.

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26 "Quin imo haud inane fortassis fuerit, doctrinae Christianae revelatae non proletariam scientiam, ab illo historico aut eo, qui ad hanc historiam affectat viam poscere." *Opera*, 5:264 lines 55–7.

27 See the text just quoted in n. 25.

28 He speaks of "historicae illius nostrae affectator scientiae" at *Opera*, 5:264 line 60.

> For there is no author whose truths are not injured by some area of error. Hence there is need for historical judgment, among the principal canons of which is that in history we should not be too credulous.[29]

If one asks how lack of credulity is to be replaced by an ability to distinguish between the trustworthy and the not so trustworthy evidence, one gets a decided answer. The solution resides in those "common laws and universal precepts" mentioned above which are the other main ingredient in the formation of "absolute knowledge of things in all details."

A few texts may be quoted to support this observation. The strongest reason he adduces to show why the study of human affairs, like any other, cannot do without rational principles occurs in his description of the requirements for the study of German history:

> The third requirement, however, [in addition to a knowledge of the rational principles of civil prudence on the one hand, and of natural law, morals, and religion on the other] which must now be touched upon, is proper and native to German history. It is to know what has been done or decreed at any time in the affairs of our {572 | 573} commonwealth, that is, of this so-called Roman Empire. For this now is the essence of our historical effort, *even though it cannot be accurately done without the help of the disciplines that we have mentioned*.[30]

Rational principles are thus considered necessary in order to assure the accuracy of the gathered data.

A slightly different problem is posed by gaps in the evidence. In the context of discussing the poor quality of the sources of early medieval German history, Conring makes a remarkable claim for the power of the same rational principles to produce knowledge even beyond what the data seem to warrant:

> For in the case of most events our ancestors' primitive ways of writing will not prevent a reader of this kind from grasping even purposes that

29 "Nullus enim est autor, cuius veritates non aliquod erroris laesit confinium. Hinc iudicio historico opus, inter cuius principes est canones; ne in historia nimis simus creduli." *Opera*, 5:271 lines 13–16.

30 "Tertium vero, quod nunc tangendum, Germanicae historiae proprium atque domesticum est. Est autem hoc, scire quid actum aut decretum aliquando sit in reipublicae nostrae, adeoque imperii huius Romani, quod appellamus, negotiis. Hoc enim ipsissimum iam opus nostrum historicum est: *etsi accurate fieri nequeat sine eorum quae diximus, adminiculo*." *Opera*, 5:265 lines 8–12. My italics.

> were passed over in silence. Just as an experienced doctor easily realizes what is not mentioned in what uneducated people tell him and supplies what is missing from the narration with the help of his medical knowledge, while someone less learned would only understand it with considerable effort, so a reader who knows public matters and human life recognizes by slight indications what has not been said and exposes the concealed reasons of things openly, relying for assistance on the powers of his prudence and natural ability.[31]

An intelligent and well-trained reader, he says, that is, a reader who knows civil prudence, morals, etc., will at least in part be able to make up for the incompleteness of any given evidence. The parallel with medicine is important since it shows once again Conring's belief in the similarities between the study of human affairs and the study of nature.

There is another, still more basic difficulty that may be mentioned here because it too requires the use of rational principles in order to prepare the data for scientific explanation. It is the fact that the available evidence {573 | 574} is almost infinite. A rational criterion is needed in order to make a selection of data possible, even before the issue of their trustworthiness can be addressed. That in itself represents a task the magnitude of which he by no means underestimates. At one point, he criticizes the kind of knowledge that results when no other principle than pleasure governs the selection of the data. He grants that historians who adopt that standard will write interesting history, because in the absence of anything else to guide them they will seize on what is most pleasurable to relate. But he leaves no doubt as to his contempt for the result, which he calls *curiosa vanitas*.[32] Elsewhere, he considers

31 "Nam ne rudis quidem illa maiorum scriptio obstat huiuscemodi lectori, quo minus in plerisque eventorum consilia silentio etiam praeterita ille adsequatur. Scilicet ut peritus medicus ex plebeia narratione facile intelligit et illa quae tacentur, supplente defectum narrationis medici peritia; quae tamen indoctior aliquis ne magno quidem nisu perceperit: Ita et reipublicae vitaeque humanae prudens lector, ex levibus indiciis cognoscit non dicta, abditasque rerum causas exponit in apricum, in subsidium prudentiae naturaeque viribus advocatis." *Opera*, 5:266 lines 49–54.

32 "Haec adeo causa est, quur multi nulla aeque re capiantur quam hoc studio: non quod fructum aliquem hinc ferant, sed quod animus incredibili voluptate semel illectus, suavissimo hoc pabulo nequeat saturari. Sed illorum hic labor fortassis non caret iusta reprehensione, etsi in illo soli liberalis ingenii homines occupentur, adeoque videri possit decere quemvis libera natum conditione. Facile quippe in iis, quae ad vitam aut necessaria non sunt aut non perinde utilia, non minus quam in aliis, intemperantia laboratur: desinitque tandem saepenumero haec diligentia in Appionis aut Dydimi curiosam quandam vanitatem. . . . Habet scilicet in huiusmodi rebus locum illud, quod de philosophia

the predicament of a novice who approaches the available literature for the first time and finds himself in danger of being overwhelmed by it. That danger can be avoided, thinks Conring, provided only that the reader is "prudent." He grows almost rapturous in describing the lightning speed with which the eye of a trained researcher is capable of sifting the relevant from the superfluous.[33]

In sum, there are two distinct problems, and perhaps more, that need to be solved even before the empirical data can be used for 'scientific' explanation. The first is the impossibility of handling an infinite amount of data. That requires the definition of a criterion of selection. The second consists of the unreliability and incompleteness of the data. Canons of historical judgment and principles of interpretation must be formulated to remedy such defects in the evidence.

It may be obvious that such convictions have profound implications for Conring's concept of a historical science, and indeed for his concept of knowledge in general. They require the presence of rational principles before the evidence can be used. The theory of knowledge that has been discussed above, on the other hand, explicitly demands that rational principles are to be constructed out of the evidence. Conring thus finds himself {574 | 575} confronted with the problem nowadays referred to as the hermeneutical circle. Since the two elements of knowledge presuppose each other, it is impossible to see how he can escape from the circle. The neat conceptual scheme according to which knowledge consists of empirical data in conjunction with rational principles is thus exploded by a contradiction.

This contradiction between, on the one hand, the brief and systematic statement of the nature of historical knowledge that Conring gives in the opening paragraphs of his preface and, on the other, his detailed account of the difficulties inherent in the study of history is the most important feature of the preface to the *Germania*. Nowhere does he address the issue as such. Perhaps that is a reason to deny him the status of a truly great thinker. But on the other hand, it is only fair to acknowledge that we have at this point encountered one of the central difficulties, perhaps the central difficulty, in the theory of knowledge that has occupied thinkers since ancient times. Moreover, even though Conring failed to turn his attention explicitly to it, his treatise contains numerous hints at possible alternatives. They make for most interesting reading and deserve to be studied with careful attention because they suggest that he

minus recte olim Neoptolemus Ennianus pronunciavit: *Philologandum est* (liceat ita nunc loqui) *sed paucis; nam omnino non placet*." *Opera*, 5:257 lines 44–56. See also below, n. 39. The quotation from Ennius on which Conring is punning can be found in Cicero, *De re publica* 1.18, trans. Keyes, 54.

33 The problem and its solution are discussed at length at *Opera*, 5:266 line 26–267 line 28.

himself was not quite satisfied with the state of affairs. Both the intrinsic difficulty of the subject and the short space available here make it impossible to give anything like a complete account of what he has to say about the matter and the implications of his position. But an outline of his views, schematic as it necessarily must be, is certainly worth the effort. It will suggest that a different theory of history is barely hidden beneath the surface of the text, a theory that takes on remarkably clear contours as soon as the contradiction in Conring's ideas is taken seriously.

Three ways can be imagined in principle to resolve the difficulty that rational principles are necessary to interpret the evidence out of which they are to be constructed. All three of them are in some fashion represented in the text. They shall be dealt with one by one.

The first is to argue that at least a few rational principles are innate in the human mind and thus do not need to be taken from the evidence. At some points Conring seems to put his trust in that way out. He does believe that there are innate ideas.

> About the life and morals of humanity and their relationship to mankind's true happiness, the best and greatest God has established many things in such a way that our mind itself {575 | 576} immediately condemns everything opposed to them as iniquitous and dishonorable.[34]

In other words, there are universally valid ideas of right and wrong. That is undoubtedly why he considered religion to be the foundation of civil prudence. But he immediately disqualifies innate ideas of this kind as sufficient foundations for a knowledge of human affairs in general, much less of natural events. For he goes on to point out that politics are mostly concerned with a mere earthly felicity.

> By far the greatest part of the matters that pertain to the commonwealth of our Empire is situated beyond the power of honor and dishonor. They are thus not controlled by such eternal laws of nature, but rather accept their laws and rights from those who have the arbitrary power of creating them.[35]

34 "De vita quidem moribusque omnis in universum humani generis, quatenus illa spectant veram omnibusque propriam beatitudinem, multa sic constituit ac sanxit Opt. Maxim. Deus, ut ipsa mens nostra ista quae contra fiunt iniquitatis statim atque inhonesti titulo infamet." *Opera*, 5:266 lines 9–12.

35 "Ergo et eorum quae ad nostram pertinent imperii rempublicam longe maxima pars extra honesti atque inhonesti vim est sita, adeoque huiuscemodi aeternis naturae legibus non

What may have seemed a promising way out of the quandary must be discarded as a merely partial solution at best.

The second way out consists of accepting the contradiction as it stands and facing the necessary consequence: all hope of true knowledge must be abandoned. Occasionally it seems as though Conring felt an attraction to this kind of skepticism. In support, one might adduce the surprising ease with which he substitutes 'faith' for 'truth' as the cardinal virtue of the historian, as though there were no difference between statements merely believed and statements proved to be true.[36]

> For it is not given to [those] born human beings to explore everything by themselves, but many things must be accepted on the considered testimony of others. What has already been attested to by the consent of better men, furthermore, only the impudent would call into doubt.[37]

In the absence of any reliable standard by which to establish the value of "the consent of better men," it is hard to see what would distinguish faith in it from faith in the opinions of anyone at all. At the same time Conring vehemently {576 | 577} condemned opinions as a "sacred illness."[38] Hence there is no doubt that he took the idea of absolute knowledge seriously and did not subscribe to pure relativism.

The reasons that permitted him to do so bring us to the third way. It consists of turning attention away from the theory of knowledge that was outlined above and towards the development of a critical method capable of accounting for the difficulties presented by it. If the analysis given so far is correct, a successful solution needs to do at least two things. It must provide a principle for selecting the evidence and it must establish criteria by which the evidence

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astringitur, sed leges atque iura sua ab iis accipit, quos penes ferendi ista arbitrium ac potestatis est." *Opera*, 5:266 lines 16–19.

36 "Tres enim sunt historici virtutes: veritas, prudentia, atque eloquentia." *Opera*, 5:259.11–12. The parallel enumeration at *Opera*, 5:263 line 35 substitutes *fides* for *veritas*. Cf. the use of *fides* in the text quoted below, n. 42.

37 "Neque vero datum est hominibus natis omnia per seipsos explorare, sed multa certis aliorum testimoniis accipienda sunt; quae porro consensu meliorum iam sunt contestata, illa vocare in dubium non nisi impudentis fuerit." *Opera*, 5:257 lines 5–7.

38 Speaking of mistaken notions of Roman law: "Verum etsi nondum quidquam detrimenti attulisset haec opinio, quis tamen non videt quam in futurum fuerit noxium, si improvidae mentes aut rerum novarum cupidae huiuscemodi erroribus imbuantur? Sacer scilicet morbus opinio est: mundus tamen hic nulla perinde re quam hac ipsa regitur. Ita et futiles nonnunquam sententiae fascinant animos, et usque adeo iudicii aciem obfuscant, ut ne claro quidem meridie veritatis solem contemplemur." *Opera*, 5:262 lines 48–53.

can be assessed. Elements of such a solution can be found scattered in several places in Conring's preface. Nowhere are they combined in any systematic way, and it may be thought foolhardy to do here what Conring did not do himself. But given the importance of the question, it is worth bringing ideas to the forefront that are undoubtedly there and bear directly on the issue, even though Conring himself did not explore their significance as far as one might have liked. But in order to avoid misrepresentation, one must insist on the hypothetical nature of this reconstruction.

To take up the principle of selection first, one may point out that, having just condemned the kind of history that results from unprincipled journeying through the data in search of nothing but entertainment, Conring turns to history that is governed by a consideration of the common good.[39] This suggests that the idea of the common good might supply the sought-after principle. There are two excellent and closely related reasons {577 | 578} why this could be so. First, the common good is a practical idea, rather than a theoretical one, and thus does not need to be constructed out of the evidence; it is given by interests. Second, it has objective validity for all of the members of the community whose good is concerned. Because it poses questions interesting for everyone, attention to the common good permits a reasonable beginning in discriminating among different pieces of evidence. Motives of this kind clearly shaped Conring's own particular path to history. As he points out, his study of the history of Germany and German law was provoked by his fear of the damage that might be done to the common good by those who argued that Germany was subject to the Roman law and thereby threatened public peace.[40]

39 "Quum enim immensa quaedam historiae amplitudo sit, per omnes scilicet res mortalium porrecta, alii ad omnem feruntur sine discrimine, alii hanc aut illam sibi seorsim addiscendam sumunt, reliquam contemnentes. . . . Accuratius tamen rem omnem intuentibus facile apparet, si voluptatis solius gratia sit tractanda historia, perinde fortassis esse ad quamnam feraris dummodo delectet. Quamquam id valeat cumprimis ea quae et varia maxime est et res narrat multum a vulgari consuetudine remotas; talia enim iucunda sunt maxime. At qui per historiam ad prudentiam atque rempublicam affectant viam, iis liquet delectum aliquem observandum esse. Non enim quaevis pari ad illam ratione est utilis." *Opera*, 5:258 lines 40–5. "Unde et ante omnia consequens est, historiam eius reipublicae, cui praeest quis sive auctoritate sive consilio, esse omnino necessariam in republica versanti homini, negligi certe haud posse sine publico detrimento." *Opera*, 5:258 lines 62–4. Cf. above, n. 18.

40 "Interest enim pacis ac salutis publicae, vel nihil loqui in vulgus de statu publico, quod Platonis consilium est, vel certe non aliter de illo loqui quam sese res habet. Dubium autem nullum est, quin periculosae sunt illae quorundam sententiae: iustum esse ut secundum Romanas leges imperii respublica conformetur. Quum enim nostra haec longe sit diversissima maximeque ab illis remota, iniustitiae praesens status arguitur: quod

The difficulty inherent in giving such a central role to the common good, however, cannot be ignored. Even if it could be allowed the function of providing the study of human affairs with an acceptable starting point, it is doubtful whether it could do so for natural science, too. It thus inevitably raises the question whether there is a fundamental difference between the study of nature and that of human affairs. It focuses attention on the relationship between practical and theoretical reason in the formation of knowledge. To insist on it would mean giving priority to practical reason. Such a conclusion may not be entirely unwarranted. It will be remembered that Conring's favorite example of the man of knowledge, the doctor, has also a practical concern in mind, namely the health of the patient. For now, however, it is impossible to go beyond the bare suggestion that the idea of the common good is a possible, but problematic candidate to fill one of the two gaps in Conring's theory of knowledge.

To turn to the other question, namely, how to acquire knowledge in spite of the fact that those theoretical principles that must be presupposed to examine the data cannot be presupposed, it is necessary to recall that Conring describes not merely one, but two ways to arrive at absolute knowledge. The first is that of the masters, who by their natural ingenuity "know how to construct common laws and universal precepts from {578 | 579} individual events." The second is that of the disciples who

> have previously learned [common laws and universal precepts] from their teachers, so that nothing except experiments is required for an absolute knowledge of things in every detail.[41]

Conring himself describes the first way as difficult, but not impossible. He considers the natural gifts required to follow it as rare, but he seems to think that they do exist. The question is whether we may leave it at that. If it is true, as he says elsewhere, that no one can even begin to study the data if he does not already dispose of some general principles, then it is not merely difficult, but impossible for the masters to do what is asked of them. The fundamental contradiction from which Conring's thought suffers is nowhere more manifest than at this point.

If it is impossible to study the data without already having acquired a knowledge of general principles, then the principles inferred by the masters from the

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motibus excitandis multum profecto valet." *Opera*, 5:261 lines 6–11. Add the text quoted above, n. 10.

41 Cf. above, n. 14.

evidence can have no absolute validity. The difference between the masters and the disciples thus turns out to be merely superficial. The former, to be sure, derive their knowledge of general principles from direct observation, whereas the latter base it only on the authority of their teachers. But in either case such knowledge is provisional and requires some other means of confirmation. The way of the disciples supplies precisely such a means. Even though it might hitherto have seemed merely an insignificant elaboration of the way of the masters, it thus acquires far greater importance than Conring seems to be giving it.

A central text may be quoted to elucidate the matter:

> To judge the trustworthiness of what the masters pronounced in a more universal manner by comparing it with the historical evidence, which is the second step [after having first learned the universal principles from the masters], not only is free from great difficulty, but is also absolutely necessary for a perfect and exact knowledge of all things. . . . Or who would dare to declare that he knows with certainty what he has not yet grasped with the senses, but only been persuaded to accept by the master's authority? But it makes very little difference to its reliability whether one has seen the matter with one's own eyes or accepts it on the certain narration of others who have so seen it. For such a disciple, therefore, history is like a Lydian stone, or a kind of ruler inasmuch as it is a compendium of {579 | 580} experience against which anyone who pursues absolute erudition must test all laws, all precepts, and all universal propositions.[42]

A few remarks about this text are in order. First, it decisively shifts the emphasis in acquiring a "perfect and exact knowledge of all things" from the construction of universal precepts out of history to testing them against history. The crucial step now is the "experiment" by which a general statement is applied to

42 "Fidem autem eorum quae ab magistris ita universalius fuere pronunciata, exigere ad historiam, (quod secundum erat) id vero ut magna caret difficultate, ita ad perfectam exactamque notitiam rerum quarumcunque per est necessarium. . . . Vel quis ausit profiteri, certo sese id scire, quod hactenus nullis usurpatum sensibus, sola magistri auctoritate fuit persuasum? Parum vero interest ad fidem, tuisne oculis rem videris, an ab aliis visam certa acceperis narratione. Tali ergo discipulo historia quasi lapis est Lydius aut amussis quaedam: ut quae experientiae compendium sit, ad quam omnes leges omniaque praecepta ac pronunciata communia explorare quemvis absolutae eruditionis affectatorem oportet." *Opera*, 5:258 lines 19–27. On Beatus Rhenanus as the source for the 'Lydian stone' see Hammerstein, "Historie bei Conring," 222n15, 230n43.

the data. Conring thus decidedly prefers to argue from principles to the data, rather than the other way.[43] It would nevertheless be a mistake to infer that the role played by history in his thought is restricted to supplying examples by which to illustrate the principles of prudence. On the contrary, history continues to furnish the raw material out of which universal precepts are made, and thus remains "of the highest necessity because it embraces experience of every kind."[44] The point is merely that the grounds on which such precepts are accepted before they have been tested against the evidence are purely hypothetical. The reason then why he prefers the road from the general to the specific, rather than the reverse, is that in coming full circle the former completes a process begun by the latter.[45]

Second, history is now given another definition, which has so far been purposely ignored. It is no longer merely a storehouse of empirical data, but also a "ruler" which makes it possible to test the validity of general {580 | 581} statements. This double function of history alone, as both raw material and instrument of criticism, makes the pursuit of knowledge possible. At the same time it should be clear that the result of arguing from general statements to the evidence may not only be to confirm or to refute the former but may also serve the opposite purpose of interpreting the evidence or filling gaps in it.

Third, there is no reason to believe that this procedure can ever completely remove the element of faith inherent in it from the beginning. Those who adopt it must rather continue forever to repeat the steps of accepting untested evidence, constructing hypotheses out of it, or learning them from the masters, performing the experiment of testing the hypotheses against the evidence, accepting the result, and subjecting it to new tests. The road towards absolute knowledge thus takes the form of an infinite circle gradually spiraling around a center which it never reaches. But because the formulation of hypoth-

43 "Caeterum quam expedita sit altera haec et posterior via, quae a prudentiae praeceptis ad historiam pergit, prae illa quae vulgo commendatur ab historiis ad praecepta ducens, quamque conveniat magis civilis sapientiae tyronibus, alias luculente ostendimus." *Opera*, 5:258 lines 27–30.

44 "Nullum tamen est dubium quin historiarum peritia non dico utilis sit ad comparandam illam prudentiam, verum per etiam necessaria, quacunque tandem via grassari ad illam fuerit libitum." *Opera*, 5:258 lines 30–2. Cf. the text quoted above, n. 13. Hammerstein, "Historie bei Conring," 225, seems to disagree: "Die Geschichte hat also immer nur illustrativen, beispielhaften Charakter, keinen eigenen Aussagewert!"

45 This reminds one of the method of resolution and composition familiar from the scientific works of Galileo and others. It does not seem necessary to pursue this issue further at this point, but it may be worth suggesting that differences are to be expected when this method is consciously applied to texts, as it is in Conring's case, rather than to sensuous observations.

eses makes the historian "prudent," such repetition is by no means futile. It rather enables him to search the evidence methodically for an answer to a clearly formulated question.

Fourth, it may now be possible to understand why Conring found it so easy to substitute faith for truth in his references to the historian's cardinal virtue. Faith comes at the beginning, and truth at the end of his search for knowledge. The difference is thus by no means abolished. But absolute knowledge resides in infinity, and therefore faith and truth coincide in practice.

Fifth, attention should be drawn to the astonishing declaration that "it makes very little difference for its reliability whether one has seen the matter with one's own eyes or accepts it on the certain narration of others who have so seen it." It is astonishing because it belittles the difference between one's own observations and observations reported by others.[46] It implies the conviction that no evidence, not even that of one's own eyes, can ever be totally relied upon, or, conversely, that all evidence requires {581 | 582} interpretation. History thus becomes, not simply *a*, but *the* empirical prerequisite for science. The consequence is that, insofar as "it is not given to [those] born human beings to explore everything by themselves, but many things must be accepted on the considered testimony of others,"[47] the model discussed above may be applied to all sciences, and not just to the study of human affairs. That is not to deny the difference between actual and reported observations. But it is to say that the former, like the latter, have to be critically analyzed in order to serve as a basis for knowledge.

Sixth, and finally, a more than conventional reason can now be suggested why Conring insists that the historian needs the virtue of eloquence in addition to truthfulness and prudence.[48] He needs truthfulness, or faith, so that he will report the evidence without intentional distortion. He needs prudence so as to interpret it rationally. But, given the finitude of the human mind, rational explanation never succeeds in accounting for the data without remainder. An element of faith continues to be left over. Perhaps it is too bold to attribute

46 Seifert, *Cognitio Historica*, 133–4, on the contrary insists on the importance of this difference for Conring's thought. He quotes from Conring's *De civili prudentia*: "Quae ex historia itaque eiusmodi singularium rerum lecta vel audita proxime quidem oritur cognitio, itidem non diversa est ab ea quae per experientiam accipitur, nisi quod aliena fide narrantium illa nitatur, experientia autem ipse (!) propius sensu perceptis inhaereat." (Seifert's exclamation mark). Yet even though reliance on *aliena fides* makes for complications, the fundamental point of this text seems to be the similarity of direct observation and history.

47 Cf. above, n. 37.

48 Cf. above, n. 36.

a place of systematic theoretical importance to eloquence in his ideas. But it is just possible that eloquence is necessary because it alone is capable of uniting truthfulness and prudence in such a way that the two will be completely fused.[49]

The effect of forcing the contradiction in Conring's views to the surface is thus to recognize a theory of knowledge quite different from the one initially proposed. It is founded on the realization that the human mind is not equipped with any absolute standard by which to ascertain the veracity of any given evidence. All knowledge begins instead with an element of faith, faith either in untested evidence or in the doctrines of the masters. The capacity of human beings for attaining truth, in other words, is severely limited. On the one hand, the radical distinction between masters and disciples is thus abolished, and the role of magisterial authority undermined. This may be considered to be one of the roots of the Enlightenment. On the other hand, as it is impossible to build knowledge on an unquestionably firm basis, faith in the authority of a magisterial tradition, "the consent of better minds," is certainly not the worst {582 | 583} indication where to begin the pursuit of knowledge, and in most cases probably better than faith in one's own natural ingenuity. It may seem paradoxical that what has just been called an enlightened way of thinking should thus replace knowledge with faith in a tradition. But the paradox is only superficial. The point of course is that one need not stop there. On the contrary, it is not only possible, but necessary to go on and to subject that faith to what Conring significantly calls "experiments." Conring's explicit theory, according to which knowledge consists of general principles that explain the empirical data, is thus challenged by an implicit one according to which knowledge resides in the infinite process of subjecting opinions to critical examination.

In order to illustrate how Conring conceived the systematic relationship between the common good, prudence, and history, a brief example may now be instructive. In the preface to the *Germania*, he asks if the Holy Roman Empire is subject to Roman law. The question is posed by his fear of the damage done to the common good by those who argue for a positive answer. Prudential principles suggest three possible reasons that would support his opponents' case: first, Roman law may be a part of justice itself; second, Germany may have voluntarily subjected itself to Roman law; third, there may be someone else who has the right to demand obedience to Roman law from Germany. There is no need now to investigate whether Conring had developed

49 On the similarly central role attributed to eloquence by earlier humanists, see Seigel, *Rhetoric and Philosophy*, especially the chapter on Valla, ibid., 137–69.

these possible answers on his own or taken them from some tradition. The point is that they serve as hypotheses to guide his investigation. In order to test them, he asks whether any one of the three applies to the historical evidence. In the course of searching the record, further distinctions turn out to be necessary. For example, tacit must be distinguished from explicit consent to Roman law. In this way, the original hypotheses are modified. In the end, he establishes that Roman law is not part of natural law, that Germany did not consent to it, and that no one had a right to impose it on Germany. These statements may now be called facts. But it is clear that their truth is predicated on the unproven assumption that no further evidence needs to be considered and that no reasons why Roman law might be binding on the Holy Roman Empire have been ignored. They are therefore not beyond question.[50]

Our results may now be briefly summarized. The most important feature {583 | 584} of the views presented by Conring in his preface to the *Germania* is the tension between a simple and explicit theory according to which knowledge consists in empirical data in conjunction with rational principles and the apparent impossibility of arriving at such knowledge. This tension is never explicitly recognized but it is implicitly present in contradictory statements about the manner in which truth is discovered. More important, an attempt to resolve it is embedded in the text. It consists of a different theory of knowledge. Instead of deriving knowledge from a firm empirical basis, the pursuit of knowledge, built on a concern for the common good, begins with the formulation of hypotheses from questionable evidence and enters on a circular and infinite process of testing the hypotheses against the evidence, and the evidence against the hypotheses. It may thus be no accident that in the mottos chosen for this essay opinion is said to rule the world, and the "the circle of reason" and "the advantage of the commonwealth" are mentioned in one breath. Perhaps it is precisely their combination that best characterizes the goal towards which Conring's thoughts were tending.

At this point, our study of Conring's concept of history, which has long ago changed into a study of his theory of knowledge in general, must come to an end. It leaves more questions open than it has answered—if it has answered any at all. Its conclusions, whatever their merit may eventually turn out to be, are as hypothetical as the basis they postulate for his thought. But since a hypothetical reconstruction is at the heart of this essay in any case, it may be fitting to end with a few equally speculative remarks about a possible place for Conring's thought in intellectual history. Here, too, the purpose is not to answer, but to raise questions.

50 The relevant text can be found at *Opera*, 5:261 line 5–262 line 39.

As may have already become evident, the theory of knowledge with which he began is directly taken from Aristotle. The initial emphasis on the natural desire of human beings for knowledge, the distinction between mere experience and scientific knowledge, the preference for the example of the doctor, and even the choice of Socrates as the patient, all appear in the opening pages of Aristotle's *Metaphysics*. The primary role played by Aristotelian categories in Conring's thought is in fact too well known to need any further belaboring.[51] The other formative influence on his {584 | 585} mind, as is equally well known, is found in Humanism, with which he became familiar during his student days at the University of Leiden. Humanist themes have not been insisted upon, but their ubiquity is obvious—obvious from the fact that the preface to the *Germania* itself is an introduction to an edition of a classical text, from Conring's insistence on good Latin style, and from his ideal of the *liber natus homo*. It is therefore extremely tempting to attribute the tension declared to have been fundamental for his thought to one between Aristotelianism and Humanism.

One must be cautious not to misinterpret the nature of that tension. It is a mistake, as the scholar to whom this book of essays is dedicated has shown, to identify Humanism with any particular doctrine. No such identification is here intended, nor is one necessary. Inveterate anti-Platonic empiricist that he may have been, Aristotle himself, after all, was forced to admit that the faculty of scientific understanding "enters [the body] from outside and is divine."[52] As has been pointed out above, reliance on innate ideas, or, in this case, the separate existence of *nous*, is one way of resolving the difficulty that Conring, like Aristotle, faced when asked how the phenomena can possibly be explained by principles that are yet to be derived from the phenomena. The contradiction in his thought thus exists in Aristotle's thought itself.

The point is rather that the difficulty, at least in the form in which it had been transmitted during the Middle Ages, was relatively comfortable to live with. Aristotle's model of knowledge was based on data conceived in terms of actual observations. At first sight, it seems so far-fetched to question the objective reality of what one has seen with one's own eyes that such data may continue to serve as a basis on which the whole building of scientific knowledge can be erected. The separate existence of the *nous* may almost seem an afterthought to an empiricist scheme that takes the data for granted.

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51 A more important, but altogether different question is whether Conring's Aristotle is the historical Aristotle.

52 Aristotle, *On Coming-to-be and Passing-Away* 2.3, 736b27ff.

Texts, on the other hand, are a kind of data whose reliability is not obvious. They have been created by human beings and may not be accepted without question. They can therefore not be incorporated in the Aristotelian model without raising the problem in an acute form. From this perspective, it may have been the most important effect of Humanism's unprecedented attention to the study of texts to have lent new urgency {585 | 586} to a very old problem. A serious effort to derive knowledge from texts could only succeed if changes were made in the idea of knowledge. At the very least, it was necessary to add to Aristotle's views. But once it was recognized that the difficulties presented by texts were merely an exacerbated form of those raised by Aristotle himself, it became imperative to transform the theory of knowledge as a whole.

The achievement of Hermann Conring, and, perhaps, that of his seventeenth-century cohorts, may thus not only have been to have posed the problem in terms that forced a decision between abiding by the Aristotelian model or creating another one, but also to have adumbrated a view of reason that came to predominate in the following century. On the surface, Conring admittedly still conceived of knowledge in Aristotelian categories. But even though he had not yet made up his mind, he already had a remarkably clear idea of a different approach. Built on concepts developed for the study of texts, it abandoned the radical distinction between empirical data and rational principles in favor of a circular procedure that could be applied to all areas of knowledge.[53] It saw the pursuit of truth as founded on the critical examination of traditional opinions, collapsed the distinction between masters and disciples, and thus provided reasons to justify the enlightened assault on every form of authority. From there, it was not far to a philosophy that was explicitly founded on the certainty that all evidence includes an element of human creativity, that denied that there is any direct access to things in themselves, that concluded that criticism is the first task of those who desire knowledge, and that imposed stricter limits on theoretical than on practical reason. From there, in short, it was not far to the philosophy of Kant.

In general, the thought of Hermann Conring can thus be characterized as a response to the growth of written culture that Humanism and printing had promoted. His humanist training and his familiarity with the difficulties inherent in searching texts for knowledge about the world forced an incipient recognition that the Aristotelian model could not be simply maintained. His response was neither fully developed nor was it the only possible one. One

53 Cf. above, n. 45. This view harmonizes with Dreitzel's characterization of Conring's achievement; see Dreitzel, "Entwicklung der Historie," 264–9. But if it is correct, the crisis of Aristotelianism, which Dreitzel dates circa 1700, ibid., 272–4, may have been well advanced at a much earlier time.

could have denied that what applied to texts also {586 | 587} applied to the study of nature. Here one may perhaps find a root of the modern distinction between science and history. One could also have built all knowledge on innate ideas. Perhaps it is possible to forge a link to Descartes in this way. Conring, however, tried a different way. His thought may not only help to understand why the German word *Wissenschaft* still covers all areas of knowledge, from history to natural science. It must also enter into an interpretation of the profound transformation of intellectual life that led to the German Enlightenment and the growing conviction that reason is historically conditioned.

CHAPTER 9

From Helmstedt via Mainz to Paris: Hermann Conring and Hugues de Lionne

Hugues de Lionne is best remembered as the successor of Mazarin. Hermann Conring taught natural philosophy, medicine, and politics at the University of Helmstedt from 1632 until his death in 1681. Through the mediation of Johann Christian von Boineburg in Mainz Conring entered into formal contacts with Lionne, and later with Colbert. During the years from 1662 until 1671 he wrote a number of memoranda on behalf of French interests. From 1664 until 1673 he was rewarded with an annual pension. His memoranda have been seen as evidence for the disintegration of the Empire and for his lack of patriotism. They are better interpreted as evidence for a vision of a European civil society that was no longer governed by religious bonds, but still conceived as a single order strong enough both to guarantee principles of natural law and to oppose the uninhibited pursuit of profit.

The topic of this paper is not distinguished by much popularity. If one may take the volumes of the *Bibliographie annuelle de l'histoire de France* as a reliable barometer of scholarly productivity in the past thirty years or so, historians of France have devoted exactly three brief articles to Hugues de Lionne, and none at all to Hermann Conring.[1] Perhaps these numbers create a slightly false impression, since they conceal the attention paid to either man in the contexts of early modern diplomatic and intellectual history. Nevertheless a few facts about Hugues de Lionne and Hermann Conring will be appreciated.

Hugues de Lionne, born in Grenoble in 1611, is best remembered as the successor of Mazarin.[2] His role in French foreign affairs has been eclipsed by that

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1 Prost, "Famille de Lionne," Ridgely, "A Seventeenth-Century Debate," and Paul Sonnino, "Hugues de Lionne."

2 For the following details see Valfrey, *Hugues de Lionne en Italie*, and Valfrey, *Hugues de Lionne en Espagne et Allemagne*, which is still the standard treatment. In addition see such classics

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of the two men for whom he worked during most of his life, Mazarin and Louis XIV, both of whom reserved control over foreign policy to themselves. But it is worth remembering that the volume of his political correspondence exceeds that of Mazarin and that he was instrumental in virtually every foreign affair from 1642 until his death in 1671. In 1631 he was called to Paris by his uncle, Abel de Servien, secretary of war, in whose service he gained his first exposure to government. In 1636 he went to Italy where he established a close and life-long association with Mazarin. After 1643, as Mazarin's chief secretary in foreign affairs, he was deeply involved in the negotiations for the Peace of Münster. In 1651 and 1652 the Fronde forced him, like Mazarin, into a period of involuntary retirement. But after his reinstatement in 1653, which happily coincided with his coming into a large inheritance, he distinguished himself on diplomatic missions to Italy, Spain, and Germany that culminated in the formation of the Rhenish League in 1658 and in the Peace of the Pyrenees in 1659. Upon Mazarin's death in 1661 Louis XIV put him in charge of foreign affairs, as Mazarin himself had suggested. In 1668 he negotiated the treaty of Aix-la-Chapelle, which put an end to Louis XIV's first war against the Netherlands, and shortly thereafter, in the treaty of Dover, he managed to divide England from the Triple Alliance. Those were his last successes.

Hermann Conring was born in 1606 in Norden, a small town in Northern Germany.[3] After a brief period of medical and humanistic studies in Leiden, he spent his entire adult life from 1632 until his death in 1681 as a professor of natural philosophy, medicine, and eventually politics at the University of Helmstedt. He wrote a series of scholarly, political, and scientific publications that are marked by extraordinary breadth of learning. At the early date of 1643 he was instrumental in introducing Harvey's theory of blood circulation to Germany. His critical analysis of the relationship between Roman and German law earned him the conventional designation "the founder of German legal history." As a consultant on several legal cases of far-ranging implications for German politics he developed lasting principles of historical criticism, and in a major study of 'civil prudence' he claimed, not altogether without reason, to have improved upon Aristotle and Bodin {126 | 127} by defining for the first

as Pagès, *Grand électeur*, J. B. Wolf, *Louis XIV*, and Mignet, *Négociations*, not to forget Bussy-Rabutin, *Histoire amoureuse*.

3 For the following details see the excellent collection of studies that was published on the occasion of the three hundredth anniversary of Conring's death by Stolleis, ed., *Hermann Conring* (1983). This volume, with outstanding bibliographies and indices pointing the way to the relevant published and unpublished sources, is the indispensable starting point for all further research. In the present context the older studies by Goldschlag, *Beiträge*, Zehrfeld, *Conrings Staatenkunde*, and especially Felberg, *Conrings Anteil*, are still of much value.

time the object and the method of political science as a strictly theoretical discipline.[4] Perhaps the most suggestive indication of his pivotal role for German intellectual life during the transition from the Reformation to the Enlightenment is that in his unofficial function as library adviser to the dukes of Brunswick-Wolfenbüttel he was succeeded by Leibniz and Lessing.

The circumstances that allowed Conring to enter into contact with Lionne were intimately related to the foreign policy of Johann Philipp von Schönborn, archbishop prince elector of Mainz and chancellor of the Empire.[5] Since the early 1650s Schönborn, who had been elected with Mazarin's concurrence, had been concerned to protect the Peace of Westphalia, and with it the independence of the German princes, from any reassertion of Habsburg absolutism by forming princely alliances in Germany and by keeping the good will of France. As is well known, his efforts culminated on the occasion of the election of Leopold I in 1658 when, together with Hugues de Lionne, he founded the Rhenish League. Conring had excellent connections to Mainz through Johann Christian von Boineburg, the chief minister in Schönborn's service and a man of whom Pufendorf judged that his political acumen was second to none in Germany.[6] Boineburg had studied with Conring in the 1640s and had not only written a dissertation on the Holy Roman Empire under his auspices, but had also become his friend and life-long correspondent. His rise in Mainz required him in 1653 to convert to Catholicism. That involved him in a prolonged dispute over confessional loyalties with his devotedly Lutheran mentor, but it did no damage to their friendship. On the contrary, Boineburg shared his diplomatic agenda with Conring and thus equipped him with an unusually well-informed perspective on the affairs of the Empire. Via Boineburg in Mainz and via the diplomatic contacts established in connection with the Rhenish League the ground was thus prepared for Conring to enter into formal contacts with the court of France.

A concrete opportunity arose in 1660 when Conring's prince, Duke August of Brunswick-Wolfenbüttel, one of the members of the Rhenish League, invited him to attend a meeting with the French emissary Robert de Gravel.[7] Immediately thereafter Conring wrote to Boineburg to ask if it might be appropriate for him to dedicate two of his most recent and most important works, namely his commentary on Machiavelli's *Prince* and his study of 'civil

4 Conring, *De civili prudentia* (1662) is generally acknowledged to be Conring's chef-d'oeuvre.

5 For the purposes of this paper Valfrey, *Hugues de Lionne en Italie*, xlvii–lii, and Felberg, *Conrings Anteil*, 32–69, are more useful than general accounts of Schönborn's familiar policies.

6 Felberg, *Conrings Anteil*, 32–3.

7 For the details of what follows see Felberg, *Conrings Anteil*, 69–85.

prudence,' to Gravel and Mazarin respectively.[8] Boineburg responded favorably, but well aware that Lionne was better placed to be of use to Conring he advised his friend in Helmstedt to substitute Lionne for Gravel. If necessary Gravel could be placated by the dedication of another book at some later time. Since Mazarin died shortly afterwards this advice was even more to the point than Boineburg could have imagined.

Thus it happened that in April 1661 Conring sent his commentary on the *Prince* to Boineburg with a request to forward it to the new French foreign minister.[9] The choice was apt. Conring's commentary represented a tactful fusion of the Machiavellian conviction that politics is a realm of action *sui generis* with the certainty that at a basic level reason of state could be reconciled with the principles of justice, morality, and natural law. It thus harmonized nicely with the position that since the times of Richelieu the French government had adopted in the debate over reason of state.[10] In June Lionne responded with a polite letter full of flattering remarks about Conring's scholarship, but devoid of any promises of money or employment.[11] It took some prompting from Conring, always via Boineburg, and several letters from Boineburg to soothe Conring's {127 | 128} disappointment until at last Hugues de Lionne sent a golden chain to Helmstedt, together with a watch that was added by Gravel.

Soon thereafter Conring's connections to France began to solidify. Again it was Boineburg who mediated.[12] In 1662 he offered Conring an opportunity to determine whether or not the recent treaty between Charles IV of Lorraine and Louis XIV, in which Charles had alienated the inheritance of Lorraine to the French king, was legitimate. Conring was somewhat hesitant. As he told Boineburg in no uncertain terms, he was convinced that the loss of Lorraine to France was not in the German interest. At the same time he sharply distinguished questions of interest from questions of right. Concerning right, he had

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8 The correspondence between Boineburg and Conring was published by Gruber, ed., *Commercii epistolici Leibnitiani . . . tomus prodromus* (1745). For Conring's correspondence with Gravel see Wolfenbüttel, Herzog August Bibliothek, ms. 84.12 Extrav., which also includes the corresponence with Boineburg, and Wolfenbüttel, Niedersächsisches Staatsarchiv Wolfenbüttel, ms. 1 Alt. 22. On Conring's correspondence in general see Herberger, "Die ungedruckten Briefe," and Ammermann, "Die gedruckten Briefe."

9 Conring, *Animadversiones politicae* (1661). Two excellent accounts of Conring's attitude towards Machiavelli, from somewhat different perspectives, are furnished by Dreitzel, "Hermann Conring," and Stolleis, "Machiavellismus und Staatsräson."

10 Church, *Richelieu and Reason of State*.

11 Printed in Conring, *Opera*, 2:982. Cf. Wolfenbüttel, Herzog August Bibliothek, ms. 84.12 Extrav., for Conring's correspondence with Lionne.

12 On the details see Felberg, *Conrings Anteil*, 72–4.

no doubt at all that the treaty was entirely legal. That was enough to please Boineburg. Apparently it was enough to please Lionne as well. In the following year he informed Boineburg that Conring could expect to receive a pension from France, and in 1664 the promise was fulfilled. From 1664 until 1670 Conring received nine hundred pounds each year; in 1671 his pension rose to one thousand five hundred pounds; in 1672 and 1673 he again received nine hundred pounds. In 1674, long after the death of Hugues de Lionne, the pensions ceased.[13]

During these years Conring wrote several memoranda on behalf of French interests abroad.[14] In 1667 he defended France's rights to the Spanish Netherlands. In 1668 he maintained that Louis XIV ought to become emperor. In 1670 he expounded ways and means by which France ought to be able to establish firm control over the Mediterranean sea.[15] At about the same time he composed an advisory on the Triple Alliance.[16] In 1671 he suggested once again that Louis XIV ought to aspire to the imperial crown. Meanwhile his ties to Lionne were extended to include Colbert as well.[17] Although Lionne had first informed him of his pension, and although he must have been instrumental in procuring it, the payments were actually supervised by Jean Chapelain under the direction of Colbert and formed part of a larger project to gain the good will of scholars abroad.[18] In 1669 Conring accordingly decided to dedicate the second edition of one of his major medical writings, a blistering attack on the Paracelsians under the title *De hermetica medicina*, to Colbert.[19] Even though the circumstances of its composition are uncertain, there can be little doubt that his memorandum of 1670 on France's role in the Mediterranean was meant for Colbert as well, whose interests were well known and who had just in the preceding year taken formal charge of the ministries of the navy and of commerce.

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13 Felberg, *Conrings Anteil*, 77–8.

14 Unless otherwise indicated, the references can be found in Felberg, *Conrings Anteil*, 78–82, and Kunisch, "Conrings mächtepolitisches Weltbild," 237–54.

15 Conring, "Consilium de maris mediterranei dominio."

16 Conring, "Bedenken zu der holländischen Triple-alliance," Wolfenbüttel, Herzog August Bibliothek, ms. 90.4 Extrav., fols. 226r–28v.

17 For Conring's correspondence with Colbert see Göttingen, Universitätsbibliothek, ms. Hist. lit. 14.

18 On Conring's correspondence with Chapelain see Wolfenbüttel, Herzog August Bibliothek, ms. 924 Helmst., ms. theol. 274, ms. theol. 277, and Chapelain, *Lettres*. On the project itself see Cohn, "Ludwig XIV," and more generally Murat, *Colbert*.

19 See the prefatory epistle in Conring, *De hermetica medicina* (1669).

What are we to make of this relationship between the Protestant professor of Helmstedt and the court of Louis XIV? Most obviously and most conventionally it has been placed in the context of early modern diplomacy. On this approach Conring's relationship to France will be interpreted as a minor chapter in the long story of the struggle between the houses of Habsburg and Valois-Bourbon for control over continental Europe. It will be taken as evidence for the weakening of German loyalties to the Empire and for the success with which France turned the jealously guarded liberties of German princes into a club with which to beat the Habsburgs.[20] But the investigations carried out in this context, from the days of Goldschlag via Felberg down even to the judgments of Erik Wolf, have long since proved unable to extricate themselves from the sterile question whether or not Conring displayed the appropriate degree of patriotism in writing in the French interest and accepting French pensions—sterile, because it begs the more important question whether or not Conring's loyalties are divided by a conceptual watershed from those expected by modern historians of the nation state (for which to look in Conring's writings is futile indeed) and because it rests {128 | 129} on the assumption that services rendered for payment are in and of themselves likely to be tainted by immorality. In the face of such assumptions little progress is to be expected from investigating the circumstantial minutiae of Conring's diplomatic exchanges. What is rather necessary is to take the cultural and intellectual background itself into view on which they took place and without which they are hardly intelligible.[21]

For this purpose it may be useful simply to point out that Conring's relationship with Lionne parallels that of a humanist with his patron in a world of learning, a republic of letters, that barely knew of national boundaries.[22] It may be worth noting that Lionne is known to have engaged in a poetic

20 Standard treatments include Stobbe, *Hermann Conring*, Goldschlag, *Beiträge*, E. Moeller, *Hermann Conring*, Felberg, *Conrings Anteil*, and E. Wolf, "Hermann Conring." For a good recent publication of more general interest see Duchhardt and Schmitt, eds., *Deutschland und Frankreich*.

21 Kunisch, "Conrings mächtepolitisches Weltbild," has similar goals in mind.

22 Note especially his own characterization of his memorandum on the Mediterranean as an attempt to demonstrate to his patrons his *pietas* towards the king of France: "Exercebo tamen et me in hoc campo, saltim quo probem sapientissimis patronis meam in christianissimum regem pietatem, et paratum regiae majestatis commodis pro virili tutandis augendisque studium indefessum ac devotissimum." Conring, "Consilium," 994. The concept of a republic of letters is a topic of growing interest in contemporary historical studies; see Neumeister and Wiedemann, eds., *Res Publica Litteraria*. It is suggestive that this topic is receiving an equal amount of interest in France, for which the current investigations of Marc Fumaroli may stand in evidence.

exchange with a learned friend in his native Dauphiné about the heliocentric structure of the universe.[23] Besides, he owned a sizeable personal library of some four thousand volumes including ancient classics like Virgil, Plutarch, Cicero, Tacitus, and Herodotus, along with Christian Fathers like St. Augustine and Tertullian as well as recent authors such as Rabelais, Montaigne, Descartes, and Corneille.[24] Conring's own library, consisting of about four thousand six hundred works and considered to be one of the more remarkable scholarly libraries of the time, was only slightly larger than Lionne's, and Pufendorf's, to mention another example, was decidedly smaller.[25]

The idea of the republic of letters as a supranational, not to say anti-national, force of integration in early modern Europe thus surely points the road towards fruitful investigations. But in order to come to terms with the conceptual gap between the political universe that allowed Conring to interact freely with the court of France and that other universe which has often constrained recent historians to disapprove of such interaction, in order, that is to say, to fulfill the historian's task of understanding past conduct, it may be more immediately to the point to take a closer look at the fundamental categories that actually informed Conring's vision of France.

For this purpose I should like to concentrate for a moment on the memorandum that Conring offered on the question how France could establish exclusive control over the Mediterranean Sea.[26] The substance of this memorandum consists of three distinct suggestions. First, France was to enter into treaties of friendship with the Turks and the pirates of Barbary.[27] True, the Turks were infidels, but relations between peoples ought to be based on respect for what Conring called "civil society." "It is impious to inflict harm for no other reason than errors in sacred religion upon those whom our age is accustomed to call infidels or heretics."[28] Hence there was nothing to be said against a treaty with the Turks that assured the peace. True again, the pirates of Barbary really ought to be destroyed since they made a living of disturbing the peace. But for one thing, objectively considered, their conduct did not differ in the least from that of the Christian Knights of Malta, and for another the pirates could not

23 Ridgely, "A Seventeenth-Century Debate."

24 Valfrey, *Hugues de Lionne en Italie*, lxxix–lxxx.

25 Raabe, "Bibliotheca Conringiana."

26 Conring, "Consilium de maris mediterranei dominio et commerciis regi christianissimo vindicandis."

27 Conring, "Consilium," 994–9.

28 "Imo in promtu est docere, impium esse, illis, quos infideles aut haereticos solet aetas nostra appellare, nocere ob sacrae religionis errores, modo illi caetera sese praestent civili societati haud adversos." Conring, "Consilium," 995.

possibly be defeated without assistance from England and the Netherlands, which was unlikely to be forthcoming.[29]

Second, France had to deploy a standing navy on its southern shores with which to patrol the Mediterranean.[30] Treaties of friendship were all very well, but only if they could be enforced. France therefore had to have a naval force as long as there was any opportunity to extend its sphere of influence, or any danger that it might have to defend itself against aggression—and Conring made it clear that in practice this would mean forever.

Third, and most important, France had to monopolize Mediterranean trade.[31] Conring has some fascinating observations to make about the means with which to raise the enormous capital without which he thought there was no hope of ever gaining such a monopoly. They ranged from forming a national merchant company {129 | 130} along the lines of the French East India company with subscriptions from individuals and including freedom of religion in order to attract Dutch and English investors, to the suggestion that wholly a third of the revenues of the French clergy ought to be set aside at an interest of two or three percent in order to permit French traders to corner the market in exports to the Levant and to India. The principle that underlay these operational details was Conring's firm conviction that it was only the "power of trade" (*vis commerciorum*) that could give France the necessary power.[32] In a brief but pointed critique of economic views that are firmly associated with Colbert, Conring insisted that imports from abroad could do no harm to the well-being of the state. Quite to the contrary, they were essential in order to increase demand for labor and therewith the wealth of France. If it had been otherwise it would have been hard to explain the power of such trading states

29 "Verum enim vero, si quod res fas est proloqui, pari illi sunt apud Turcam et Mahometanos conditione, qua apud pontificem et christianos sunt equites Melitenses. . . . Et vero exscindere piratas . . . non est situm in christianissimi regis potestate. Quodsi cum christianissimo rege serio conjunctis armis Angli et Batavi rem aggrederentur, fortassis expectari plena victoria possit. At ne quidem Batavos inter et Anglos hactenus in id convenit, utrisque suam rem seorsim agentibus, et ex aliorum damno solis sibi commerciorum lucra quaerentibus, eoque non est quod foedus ejusmodi bellicum expectetur." Conring, "Consilium," 997–8.

30 Conring, "Consilium," 999–1001.

31 Conring, "Consilium," 1001–8. On actual trading conditions in the Mediterranean see the informative attack upon standard views by Israel, " Phases of the Dutch *Straatvaart*."

32 "Tertium ea commerciorum vis, quae sensim omnium aliarum gentium, ipsorumque Batavorum, negotiationes queat corrumpere." Conring, "Consilium," 994.

as Genoa and Venice, not to mention contemporary England and the Netherlands.[33]

The primary objective of these three suggestions was to increase the power of France along the lines of reason of state. One of the more striking features of Conring's analysis thus consists of the detachment with which he weighs the forces that will drive allies of Spain into the arms of France if France can offer them protection from the Turks, and with which he equates the Knights of Malta with the pirates of Barbary.[34] At the same time the pursuit of power did in Conring's view not simply coincide with reason of state. Power was rather limited in two distinct, but complementary ways. One was natural law, functioning as the remainder of a medieval tradition of law stripped of at least the greater part of its religious quality. The other limitation was more forward-looking. Conring was certain that power, especially military power, depended on capital. Armies had to be paid with taxes; taxes, "the sinews of military power," could only be increased where there was *opulentia populi*; and no people could be wealthy without commerce.[35] This is the reason why he defined the Netherlands and England as France's most important rivals, and also why he was strictly opposed to any war of France with either one of them. For war could only lead them to unite their forces, and united they would prove too powerful for France.[36] The proper route to go was rather to let them weaken

33 "Ad hoc etiam pauperes quique ex commerciorum ejusmodi majore solito frequentia innumeros poterint fructus capere, sive ipsi navales operas praestare, sive manu operari necessaria commerciis ad importationem et advectionem adjumenta velint, in universum vero modico pretio comparare omnes sibi poterunt mercatura hac, quae aliunde allata fuerint, et majore lucro ea quibus abundant, sive naturalia sive arte facta, exteris divendere. Haud crediderim visum iri cuiquam, monopolio constituto plus in Franciam externarum mercium fore ut afferatur, quam possit rursum distrahi. Nec enim haec quidem sollicitudo non ridicula fuerit. Quidni enim illa omnia a Francis imposterum aeque possint distrahi, atque olim factum a Genuensibus et Venetis, et hodie fit ab Anglis et Batavis." Conring, "Consilium," 1004.

34 "Itali ipsique Hispaniae regis subditi, quo possint tuti esse a Turca, sensim reverebuntur sceptrum christianissimum, et animo in regem erunt prono, quin sponte sua subjicient sese christianissimi regis defensioni." Conring, "Consilium," 997. Cf. above, n. 28.

35 "At vero opulentia populi in universum omni regno aut reipublicae prodest ad imperii fines dilatandos. Quae divitiae populum reddunt aptum partim tributis conferendis, partim et vectigalibus exsolvendis, quibus praecipue solent stare res aerarii publici, quod nervus eximius omnis militiae sint opes." Conring, "Consilium," 1006.

36 "Enim vero in confesso est, per vim meram, hoc rerum statu, et superstite in hoc mari Anglorum Batavorumque auctoritate, dominium illud non posse comparari, idque quandoquidem illi junctis viribus, ceteroquin aemuli, opponent sese indubie violentis conatibus, et quidem successu, quantum videtur, regis christianissimi rebus multum periculoso,

each other through their competition with each other and meanwhile to build up French capital by cornering a market in which the enemies of France had relatively little interest. That would enable France to fulfill its appointed role as guarantor of a European order.

These observations are barely enough to scratch the surface of Conring's memorandum, and they do not even come close to capturing his views on the interaction between natural law, utility, and commerce in civil society. But they may suggest that his relationship to France ought to be considered as evidence, neither for the disintegration of empire nor for the unprincipled opportunism of a self-seeking courtier, but for the ways on which an intelligent German observer in the later phases of Humanism was led to assign to France a central role in European politics that was much less affected by motives of national loyalty than is sometimes thought. If his advice to France is informed by national motives at all, then negatively, in his desire to constrain the logic of national self-aggrandizement and his fear of those who recognized no other logic than that of military aggression and profit for profit's sake. He had a vision of a society of European scope that, on the one hand, was no longer governed by religious bonds, but was on the other not to be governed exclusively by force and competition either. He aimed at a common European good of which commerce was no less {130 | 131} an integral part than standing navies, but which also hoped for a single power strong enough both to enforce the principles of natural law and to oppose the uninhibited pursuit of profit.[37]

This was the role that Conring wished the most Christian king of France to fulfill.[38] It goes without saying that this involved empire-building.[39] Indeed,

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si non jam aperte noxio. Hinc non nisi cum tempore parari illud dominium poterit, et lento quodam gradu: Crescit occulto velut arbor aevo." Conring, "Consilium," 994. It deserves to be noted that these opinions harmonize nicely with Lionne's critical attitude towards Louis XIV's policy of military agression in the Netherlands; see Sonnino, "Hugues de Lionne."

37 Note his opinion that the English and the Dutch were "quaestui supra, quam fas propemodum est, dediti." Conring, "Consilium," 994, and his charge that they sought profit exclusively by inflicting losses on others, quoted above, n. 29.

38 Conring's dedicatory letter to Colbert in his *De hermetica medicina* (1669), which contains effusive praise of Louis XIV, is therefore more than 'mere' rhetoric.

39 See his linkage between popular wealth and "extending the boundaries of empire," above, n. 35, and the opening words of the memorandum: "Inter ea, quae magnum christianissimi regis potentiae incrementum conciliare, aditumque ad majora parare sunt idonea, haud temere prius aliquid reperire fortasse fuerit, mediterranei maris, si non omni potissima tamen ex parte, imperio. Enimvero ita comparatae res sunt, ut reapse idem fere sit maris dominatus potiri, atque summam aliquam vim in proximas mari terras obtinere. . . . Latissime autem extensae sunt illae terrae per Europam, Asiam et Africam." Conring, "Consilium," 989–90, 992.

Conring's plans amount to a strikingly lucid analysis of the logic underlying the imperial and colonial expansion of modern Europe. Yet precisely for this reason the point to be stressed is that he meant control over the Mediterranean Sea to be neither an end in itself nor just a means to increase French glory without regard to principles of justice and morality. It was rather part of a larger undertaking of which he hoped that it might permit the king of France to oppose the profit-seeking Dutch and English, to succeed to the imperial crown, and thus to guarantee some universal order in an age that could no longer trust religion.

CHAPTER 10

A Question of Right: Hermann Conring's *New Discourse on the Roman-German Emperor*

In his *New Discourse on the Roman-German Emperor* Hermann Conring (1606–81) argued that the Roman Empire had disappeared from the face of the earth or had at least been reduced to a sorry remnant in the hands of the papacy. Germany was a modern state that existed on entirely independent foundations. Conring's analysis helped to restore a lasting political order without reinvoking principles of universal governance that the Reformation had effectively destroyed. In spite of its brevity and disputed authorship, the *New Discourse* can thus serve as an introduction to one of the main turns on the road from medieval to modern conceptions of political order. Its success raises two questions: Is the history that Conring deployed to make his case still worth telling? And how are we to explain its success in the first place? The answers to those question go beyond the limits of this article.

In 1642 a short book entitled *Discursus novus de Imperatore Romano-Germanico* or *A New Discourse on the Roman-German Emperor* was published under the name of Hermann Conring by an unknown printer in an unknown place.[1] The purpose of this article is to draw some attention to that book and its significance for our understanding of early modern European political thought. I will divide my presentation into three parts: first, the interest of the *New Discourse*;

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1 Conring, *Discursus novus* (1642). The term 'discourse' has become something like a registered trademark for a brand of contemporary scholarship so well known that using it to translate the title of Hermann Conring's *Discursus* may raise suspicions that I intend to increase his share of the intellectual market by dishonest means. In order to escape that suspicion I toyed with *A New Account of the Roman-German Emperor* for a while, but then rejected it because it sounds too much like a statement of debits and credits from a Habsburg bank. Unless someone with more imagination than I finds a better translation, it will therefore have to remain *A New Discourse on the Roman-German Emperor*.

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second, the argument presented in it; and third, two unanswered questions that follow from this analysis.[2] {739 | 740}

1 The Interest of the *New Discourse*

To the best of my knowledge no one has paid serious attention to the *New Discourse on the Roman-German Emperor* since the seventeenth century.[3] It is not hard to see why. It is a slight book of less than forty pages that appeared relatively early in Conring's life and was soon overshadowed by larger volumes on the same and many other subjects that he produced over the course of a prolific career.[4] Moreover, it was published without his consent, and when he learned of its publication, he rejected it sharply—even though it was identical to a work of indisputable authenticity that Conring himself republished late in his life.[5]

Historians with an interest in Conring's ideas have thus had good reason to focus their attention on other works—longer and later works that were

2 This is not the right place to introduce readers to Hermann Conring's life and works. The indispensable starting point for anyone looking for more information on those matters is Stolleis, ed., *Hermann Conring* (1983). Also useful is the illustrated catalog of the exhibition that took place at the Herzog August Bibliothek in 1981: Herberger and Stolleis, *Hermann Conring*. E. Moeller, *Hermann Conring*, though dated, is still the most complete biography. For a concise recent overview see Willoweit, "Hermann Conring," (1995).

3 I have not found more than cursory references to the *New Discourse*, for example, by E. Moeller, *Hermann Conring*, 94–5. Matters are only slightly better with the *Exercitatio de Imperatore Romano Germanico* (1641), a closely related work that is briefly summarized by Knoll, *Conring als Historiker*, 24–6, and Willoweit, "Kaiser, Reich und Reichsstände," 324–5. Cf. below, n. 36.

4 Kelly and Stolleis, "Gedruckte Werke," 535–72, list 294 published works. The edition of Conring's *Opera* by Johann Wilhelm Goebel consists of six monumental folio volumes and an index volume. Even so it still excludes all of Conring's writings on medicine and natural philosophy as well as most of his forays into confessional polemics, which would easily amount to several more folios. Moreover, some of Conring's works, such as his evaluation of the relationship between the city and elector of Cologne, were never published. For eulogies of Conring's productivity see "De Hermanno Conringio ejusque scriptis doctorum virorum judicia et testimonia," compiled by Goebel, ed., *Opera*, 1:xxv–xxxvi.

5 That work was the *Exercitatio de Imperatore Romano Germanico*, resp. Bogislaus Otho von Hoym (HelmestadI: H. Müller, 1641), reprinted in Conring, *Exercitationes academicae* (1674), 32–72, and in *Opera*, 1:528–42. Cf. Kelly and Stolleis, "Gedruckte Werke," 540, nr. 47. For Conring's rejection of the *New Discourse* see his preface to *De Germanorum imperio Romano* (1644) in *Opera*, 1:27, as well as the preface to his *Exercitationes academicae* (1674), sig.):():(1–2.

indisputably written by Conring and that contain mature statements of his ideas. One thinks, for example, of the magisterial *De Germanorum imperio Romano liber unus* of 1644, an important book that is closely related to the *New Discourse* because it was published only two years later and deals with the same subject, but in more depth and at greater length.[6] One also thinks of Conring's celebrated attack on Roman law, the *De origine iuris Germanici* of 1643, which made his reputation in the seventeenth century and continues to be responsible for most of the modest fame that he enjoys today because it amounted to the first plausible explanation of the channels through which the practice of Roman law entered Germany in later medieval and early modern times.[7] Above all one thinks of the *De civili prudentia* of 1662, perhaps {740 | 741} the crowning achievement of a lifetime of reflection on politics and one of the most important statements of political theory to appear in seventeenth-century Germany.[8] Works like these loom much larger in existing scholarly treatments of Hermann Conring than does the *New Discourse*.[9]

Nonetheless there is much to be learned from reading the *New Discourse*, and some material that would be difficult to learn elsewhere. For first of all, and in spite of Conring's repeated refusals to recognize it as his own work, his own work is precisely what it is, albeit in a sense that needs a more detailed explanation than can be given at this point.[10] More important, and quite apart from the question of authorship, there can be no doubt that it contains his

6 *De Germanorum imperio Romano liber unus* (HelmestadI: H. Müller, 1644), also in *Opera*, 1:26–107, written, at least in part, in order to set a record straight that Conring believed to have been muddied by the unauthorized publication of the *New Discourse*. It may be characterized as an authorized and bigger sibling of the *New Discourse*. Cf. E. Moeller, *Hermann Conring*, 95–9.

7 *De origine iuris Germanici commentarius historicus* (Helmestadii: H. Müller, 1643), also in *Opera*, 6:77–202. This has recently been translated as *Der Ursprung des deutschen Rechts* and embellished by an incisive assessment of its importance by Stolleis, "Hermann Conring und die Begründung."

8 *De civili prudentia liber unus* (Helmestadii: H. Müller, 1662), also in *Opera*, 3:280–421; cf. Dreitzel, "Hermann Conring und die Politische Wissenschaft." It may be worth reporting that John Jay owned a copy of the *De civili prudentia* that is now preserved in the library of Columbia University—a small but intriguing clue for links between early modern German legal thinkers who are widely ignored and the founders of the American Constitution.

9 Even these works, however, have not nearly received the attention they deserve—not to mention Conring's substantial medical writings, which have been almost entirely forgotten.

10 For more information see below, chap. 12, where the place of the *New Discourse* among the works of Hermann Conring is analyzed in detail.

chief arguments about the legal and constitutional relationship between the contemporary German kingdom in which he lived and the ancient Roman Empire whose law he is famous for having subjected to historical criticism. It may lack some of the subtleties and some of the evidence that were going to be included in the *De Germanorum imperio Romano* in 1644, but the subject, the structure, the argument, and sometimes even the choice of words are the same. For all practical purposes the *De Germanorum imperio Romano* is nothing more than a revised and expanded statement of a case that had already been made in the *New Discourse on the Roman-German Emperor*. The *New Discourse* thus is an early, brief, and unvarnished statement of a thesis that was going to remain central to Conring's thinking about the Holy Roman Empire throughout a long and productive scholarly life. Anyone looking for a rapid introduction to Conring's achievements will do well to start there.

In addition, the *New Discourse* helps us to understand the development of Conring's ideas and the obstacles that he encountered in presenting them to a wider public. This is because the basic similarity between the *New Discourse* of 1642 and the *De Germanorum imperio Romano* of 1644 does not hold without exception. There are differences.[11] They are few, but they are telling, because they concern the direction in which Conring's argument was leading and the lengths to which he was willing to take it. Furthermore it was only in the earlier work, the *New Discourse*, that he took it to its logical conclusion: the Roman Empire had either ceased to exist completely or been reduced to a rather sorry remnant that was now in the hands of the papacy and consisted of the city of Rome and its environs.[12] Although that {741 | 742} conclusion followed easily from the principles on which Conring rested his case, it had implications for contemporary politics that were bound to stir up trouble for their author. To declare in the middle of the Thirty Years War, at a time when Ferdinand II, a Catholic monarch who considered himself to be Roman Emperor, was relying on force of arms to subject Protestant princes to his rule, that the Roman Empire had ceased to exist or had fallen into the hands of the papacy was to call for, shall we say, unnecessarily hostile attention. Thus, when the unauthorized publication of the *New Discourse* unexpectedly compelled Conring to take responsibility for his ideas in front of a larger audience than he was prepared to face, he retreated. Distancing himself from thoughts he had permitted

11 There are similar differences between the *New Discourse* and the revised version of the *Exercitatio de Imperatore Romano Germanico* that Conring published in his *Exercitationes academicae* in 1674.

12 *Discursus novus* 52. Since the chapters in the *New Discourse* are mostly short, and since the text was printed in several editions with different paginations, it seems more economical to refer to chapters than to pages. See also below, p. 364.

himself only two years earlier, he disowned the *New Discourse*, reworked its substance into the *De Germanorum imperio Romano*, and took care to soften the edge of his conclusions by insisting that the Roman Empire, sorry remnant though it may very well have been, did most definitely, absolutely, even positively continue to be in the hands of the king of Germany—and whoever said the opposite was a rascal and a fool.[13]

The *New Discourse* thus helps us with a difficulty that is typical for Conring's writings on political issues. Conring was an author with more than the usual degree of circumspection. It is often hard to tell whether he was speaking openly or was keeping his true opinion to himself. One suspects that such self-denying restraint had become a habit ever since, upon returning to Germany from his sojourn as a student in the Netherlands, he had accepted a position at the University of Helmstedt in 1631.[14] Even contemporaries observed that, perhaps precisely because of the boldness with which he often departed from commonly held views, he was accustomed to "dissimulate" so as to avoid offending powerful interests.[15] Respect for, and fear of, the authorities inclined him to stop short of stating his views so sharply that conflict could not be avoided.

More than likely that explains the discrepancies between the *New Discourse* and the *De Germanorum imperio Romano*. The *New Discourse* thus allows us to catch a glimpse of Conring's mind at a relatively unguarded moment—early in his life, {742 | 743} before he had been reminded to conduct himself with more

13 That was the conclusion of the *De Germanorum imperio Romano* 13.27, *Opera*, 1:107. But even in this work, though in a place less conspicuous than the conclusion, Conring reckoned with the possibility that the Roman Empire had disappeared completely; see below, n. 46.

14 In the Netherlands Conring had enjoyed considerable intellectual freedom and developed great sympathy for Arminianism. At the University of Helmstedt, however, Lutheranism was obligatory—so much so that Conring did not believe that he could speak freely in front of even his most devoted supporters. He bared his soul in a letter written to his mentor Caspar Barlaeus in June 1631, just prior to his return to Germany. The letter is printed and translated into German in Herberger and Stolleis, *Hermann Conring*, 28–9. The scorn poured by E. Moeller, *Hermann Conring*, 28, on Conring's decision to return to Germany in order to accept a secure position at what was at the time one of the leading German universities, instead of standing up for his convictions and facing an uncertain future, seems a bit out of place.

15 Remembering conversations with Conring, Pufendorf thus commented: "In most respects he agreed with me on the state of Germany and freely shared with me writings of his whose character differs widely from those of the crowd. Nonetheless, even though he expressed himself quite frankly on any number of issues in these writings, it was evident that he kept a great deal to himself in order to avoid offending the powerful or provoking the anger of Catholics"; translated from *Opera*, 1, sig. a 4^{v}.

circumspection by the glare of publicity and the battles with hostile readers into which he was going to find himself being drawn over and over again. At the time he was still prepared to argue that the Roman Empire had disappeared from the face of the earth. This was not the case later in his life. That helps us to understand precisely where in the 1640s a young professor at the University of Helmstedt with radical ideas about the relationship between the German kingdom and the Roman Empire drew the line between what he allowed himself to speculate in private and what he was willing to announce to the public. Put more generally, it helps us to identify where in mid seventeenth-century Germany the lines of constitutional debate were drawn.

Even though the *New Discourse* was published without Conring's consent and in spite of his denials, it continued to circulate under his name. It was read, reread, and in the mid-1650s it was even republished in yet another unauthorized edition that conflated the *New Discourse* with certain passages taken from the *De Germanorum imperio Romano*.[16] According to Conring's own testimony, that version was read in France, Italy, Spain, and England.[17] Evidently the *New Discourse* met a real demand. At last that seems to have persuaded Conring himself that, instead of ignoring, denouncing, or attempting to suppress pirated editions, he was better advised to compete with them by publishing a version authorized by himself.

That is precisely what he did towards the end of his life. He assembled ten dissertations that his students had written about various aspects of the constitution of the Holy Roman Empire between 1641 and 1669, including the *New Discourse*, reviewed them, revised them, sometimes extensively, and published them as a collection under the title *Exercitationes academicae de republica imperii Germanici* in 1674.[18] There, interested readers can find the authorized

16 This is the *De Imperatore Romano Germanico discursus historico-politicus* contained on pp. 275–309 of the *De imperii Germanici republica acroamata sex historico-politica* (Ebroduni: Apud Societatem, 1655; the frontispiece preceding the title page has 1654 as the year of publication). I have not been able to identify the nature of the 'society' named as the publisher. The *De Imperatore Romano Germanico discursus historico-politicus* is not simply a copy of the *New Discourse*, but a composite containing chapters 1–5 and 24–56 of the *New Discourse* and chapters 2–5 of *De Germanorum imperio Romano*. Apart from the *De Imperatore Romano Germanico discursus historico-politicus* the *Acroamata sex* contained dissertations by Conring's students on the imperial estates in general (1–23), the cities (25–76), the dukes and counts (77–96), the electors (97–120), the bishops (121–96), and the imperial courts (197–274).

17 Conring, *Exercitationes academicae* (1674), sig.):():(2.

18 Conring, *Exercitationes academicae* (1674). The preface he wrote on that occasion is a gold mine of information about his relationship to his students and his attitude towards the *New Discourse*. In addition to the *New Discourse* and the six dissertations that had already

version of the *New Discourse* that Conring decided to put forward in the end.[19] {743 | 744}

Over the objections of its author, who would rather have seen it vanish from the face of the earth, the *New Discourse* thus turned out to be something of a success. It was published twice against his will and once by himself, though under a different title. It had a career that is worth studying in its own right because it throws a bright light on at least three subjects: the demand of a learned audience for writings on the imperial constitution like the *New Discourse*; the intricate questions lurking behind the apparently simple concept of authorship; and the hard times that Hermann Conring had in trying to exercise the rights that the concept of authorship is supposed to entail.

Finally, and most important, the brevity of the *New Discourse* and its early date are something of an advantage for anyone seeking to understand what precisely Hermann Conring set out to do and why it mattered in the broad scheme of early modern European history. The *New Discourse* contains the crucial ingredients in his theory of German law and the German state, but only the crucial ingredients. It does not encumber them with the details that did as much to complicate his case as they helped to bolster it later on. It shows with marvelous lucidity how he translated a question about constitutional law into a question about history and thus redrew the boundary between questions of right and questions of fact. It underscores both the simplicity and the extraordinary conceptual and historical significance of that single step—a step that seems so obvious from hindsight and was so difficult to take at the time. It allows us to perceive why history began to matter in the early modern period as it had not mattered in the Middle Ages, and how deeply its origins were rooted in the study of law.[20]

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been included in the *Acroamata sex* of 1655, the *Exercitationes academicae* included three new dissertations that had first been published between 1666 and 1669. They deal with the imperial diets, the business conducted at such diets, and imperial *officiales*, i.e., the prince electors.

19 Under the title *De Imperatore Romano Germanico* in Conring, *Exercitationes academicae* (1674), 32–72. This is the version that was reprinted by Goebel in *Opera*, 1:528–42. For differences between this authorized version and the unauthorized one of 1642, see below, chap. 12.

20 The standard treatment of the relationship between modern approaches to history and the study of law in Germany, but with an emphasis on the period following Conring's life, remains Hammerstein, *Jus und Historie*. For a more recent study with a wider chronological frame of reference see Muhlack, *Geschichtswissenschaft*. For France, Kelley, *Foundations*, furnishes the most accessible general treatment, while Franklin, *Bodin and the Sixteenth-Century Revolution*, focuses on perhaps the single most important figure. For England similar questions have been investigated by Pocock, *Ancient Constitution*, and for

The *New Discourse* can therefore serve as an introduction, not only to the thought of Hermann Conring and his preoccupation with the Holy Roman Empire, but also to one of the main turns on the road from medieval to modern conceptions of political order. Far more briefly, but just as directly as Bodin's *Method for the Easy Comprehension of History*, it enters into the question how, in the aftermath of the Reformation, a lasting political order could be restored without reinvoking principles of universal governance that the Reformation had effectively {744 | 745} destroyed.[21] In different places and at different times that question had to be answered in different ways. Conring's answer was predicated on circumstances in Germany in the middle of the seventeenth century. Germany was the place where the Reformation had started in the sixteenth century; it was also part of the Holy Roman Empire; it was divided into a multitude of states ranging in size from middling to tiny that made political centralization as practiced by the monarchs of England and France impossible; and it had only recently given a standing to Roman law as high, not only in theory but also in practice, as France and Italy had been giving it for much longer, if not in theory, most certainly in practice, and as England was never going to give it at all. Hence, in Germany, allegiance to the kind of universal order that was embodied in the claims of Roman law—the kind of order that is generally, though inaccurately, referred to as medieval—played a very different role than it did elsewhere.[22] Hence the modern relationship between law, history, and politics was configured differently in Germany than it was in other places. Hence also Conring's writings look quaintly antiquarian by comparison with those of Jean Bodin. But it may be worth pointing out that the writings of Jean Bodin themselves when actually inspected look quaintly antiquarian, too. More important, no matter how different the answers and the circumstances from which they arose in Germany, Italy, France, or England, the principles on which they were founded are in all circumstances more remarkable for their similarity than for their differences. At bottom the question was everywhere

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Italy Maffei, *Inizi dell' umanesimo giuridico*, is still illuminating. {For incisive criticisms of the understanding of history and sovereignty in the writings of Kelley, Franklin, and Pocock, see now Davis, *Periodization and Sovereignty*.}

21 Bodin, *Methodus ad facilem historiarum cognitionem* (1572), in Bodin, *Oeuvres philosophiques*, ed. Mesnard, 105–269. Translated as *Method for the Easy Comprehension of History* by Beatrice Reynolds.

22 It should be added that allegiance to a universal order played a more important role in England and France than is commonly recognized in the secondary literature, which has, on the whole and until recently, relentlessly focused on those elements of the time that point towards the emergence of a modern political order. For a different perspective see, e.g., Bosbach, *Monarchia universalis*. Cf. below, chap. 17.

the same: How could public order be restored in the absence of the religious sanctions that had at least in theory guaranteed peace until the Reformation? And at bottom the answers, including Conring's answers, turned everywhere on a new perspective on history and the realignment of divine, natural, and positive law with historical facts that was enshrined in the theory of sovereignty.

That is the overarching historical context in which the *New Discourse* deserves to be interpreted. It sought to secure the legitimacy of the German state on its own footing, in the face of confessional turmoil, and without having to rely on Roman law. Instead of accepting the claims of the Roman Empire as a normative reality, it sought to reduce them to a fact of passing, indeed, past historical significance. It thus gives us a means of studying an important moment in the disassemblage of medieval, and their transformation into modern, conceptions of order that took place all over early modern Europe. It is also a telling instance of that transformation in a particular setting whose importance for our understanding of the underlying historical process exceeds by far the attention it is ordinarily given in studies {745 | 746} of early modern European legal and political thought, namely, the Holy Roman Empire. In that sense it throws light on a subject of European dimensions.

2 The Argument of the *New Discourse*

The *New Discourse* opens with a few straightforward questions: Was the king of Germany entitled to call himself Roman Emperor or was he not? Had the Roman Empire ceased to exist or had it not? And if it had ceased to exist, had all of its rights expired as well or had they been transferred to someone else who continued to hold them at present?[23]

These questions went straight to the constitutional foundations of the Holy Roman Empire, and thus to the foundations on which the house of Habsburg had established its rule. They also struck at the core of that vision of history according to which an unbroken continuity extended from the present backwards to the times when Augustus had founded the Roman Empire and when Christ had been born.[24]

The received wisdom, as Conring saw it, gave an obvious answer to the questions he raised.[25] Of course the Roman Empire continued to exist, chiefly

23 *Discursus novus* 1–3.

24 In lieu of many other possible references, see Seifert, *Rückzug der Prophetie*, which pays special attention to Conring's views on these issues.

25 *Discursus novus* 4.

in Germany and Italy, and of course the king of Germany was entitled to call himself Roman Emperor. The Roman Empire was supposed to endure until the end of the world. Since the end of the world had not yet come, the Roman Empire could not very well have ceased to exist either.[26] But Conring disagreed with the received wisdom and he proceeded to explain why.

His first step was to identify the limits of the Roman Empire in antiquity.[27] Here, too, there was a received wisdom: the Roman Emperor had ruled the entire world. Bartolus (1313/14–1357) himself, perhaps the greatest jurist of the Middle Ages, "was so certain of this truth that he did not hesitate to brand conflicting views as heresy."[28] But Conring thought that Bartolus was wrong. To prove his point he {746 | 747} divided the issue into two parts: the question whether or not the Romans had ruled the world in fact, and the question whether or not the Romans had the right to rule the world.

As far as the question of fact was concerned, Conring thought the answer was obvious: the Roman Empire had not even included all of Europe, much less the new world that had only recently been discovered. The Romans could not possibly have ruled the entire world in fact.[29]

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26 Conring did not directly address prophetic statements about the expected coincidence between the demise of the Roman Empire and the end of the world until chapter 54.

27 *Discursus novus* 5–13.

28 "Usque adeo enim verum id esse [i.e., totum terrarum orbem Romanis olim paruisse, vel certe parere debuisse], ut alios nunc taceam, credidit olim magnum illud Iurisconsultorum lumen Bartolus, ut non dubitaverit adversam sententiam haereseos postulare." *Discursus novus* 5. In spite of its brevity, this reference to Bartolus is absolutely crucial for understanding Conring's frame of reference. It announces his intention to break with what one may call the main tradition in legal thought. In addition to Bartolus, Conring referred to Roman law, the Gospel of Luke, Petronius, and Dionysius of Halicarnassus. With the exception of the reference to Dionysius of Halicarnassus all of these references were borrowed, without acknowledgment, from Grotius, *De iure belli ac pacis* 2.22, sec. 13, trans. Kelsey, 2:551–2. Grotius for his part, but with acknowledgment, had taken the references to Roman law and the Bible from Bartolus, while adding the reference to Petronius. Cf. Bartolus on Dig. 49.15.24, s.v. 'hostes,' nrs. 6–7, *Opera*, 6:228ra. The Roman law supporting the reference to the emperor as *dominus mundi* is Dig. 14.2.9. What Bartolus actually thought about these matters remains the subject of a debate transcending the limits of this article. Compare, e.g., David, "Contenu de l'hégémonie impériale," with Skinner, *Foundations*, 1:10, or Willoweit, *Rechsgrundlagen*, 25–6.

29 Contrary to the impression given by Conring, Bartolus himself was not only perfectly well aware that the Roman Emperor had never ruled the whole world as a matter of fact, but even used the distinction between questions of right and questions of fact to excellent purpose in his commentary on the opening law in Justinian's *Code* that is generally referred to as the law *Cunctos populos*; cf. Bartolus on Cod. 1.1.1, *Opera*, 7:3va, nr. 1. See C. N. S. Woolf, *Bartolus of Sassoferrato*, 21–2. Again the interpretation of Bartolus's

As far as the question of right was concerned, Conring began by distinguishing three sources from which, in principle, the Romans could have obtained such a right. These sources, he maintained, were the law of God as contained in the Bible, the law of nature and nations, and the civil law. Now concerning divine law it was obvious that nowhere in the Bible had God revealed any law that endowed the Romans with the right to rule the world. Concerning natural law it was obvious that there was no means by which a Roman right to rule the world could have been deduced from "the known principles of nature."[30] Concerning human law it was obvious that the Romans could not really have derived the right to rule the world from a law of which they were themselves the authors:

> Even a child can see that the civil law of the city of Rome could not possibly have given the Romans the right to rule the world, for how could the entire world be bound by a law that was established by a single people in their city?[31]

Not even the Romans themselves, moreover, had ever made any such claims. They had been careful to distinguish their civil laws from natural law, precisely because they recognized that only the latter was universally valid, but not the former. Moreover, whatever rights they claimed in places where their civil law was valid, which is to say, within the boundaries of their empire, were not written in stone. They had been acquired, and thus they could be lost in exactly the same ways in which such rights were lost and acquired all the time: by conquest, contract, donations, and similar means.[32] In sum, there was no source at all from which the Romans could have derived the {747 | 748} right to rule the world. They had not ruled the world in fact and they had not had the right to rule it either.

Next Conring turned to the history of the early Middle Ages in order to show that by the eighth century the Romans had lost most of whatever rights they had once held in Western Europe.[33] That was certainly true for Germany itself,

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meaning is disputed, and the relationship between Conring and Bartolus too complex to be explored here.

30 "Tale enim jus Naturae aut gentium nemo hominum ex principiis natura notis hactenus probavit vel probare conatus est, nec probari videtur posse." *Discursus novus* 11.

31 "Iure porro civili urbis Romae non potuisse Romanis jus aliquod competere in terrarum orbem vel puero liquet. Qui enim totum terrarum orbem obliget, quod unus populus sua in urbe constituit?" *Discursus novus* 11.

32 *Discursus novus* 12–13.

33 *Discursus novus* 14–25.

which the Romans had never ruled to begin with. It was also true for England, France, and Spain, where they had been thoroughly defeated by early medieval conquerors of Germanic extraction.

Italy was more complicated because it was divided into three different areas. The North was controlled by the Lombards, the middle by the bishop of Rome, and the South by the Eastern Roman Empire.[34] But though there was some dispute about the precise location of the boundaries between the three parts of Italy, one thing was certain: neither the kingdom of the Lombards in the North nor the areas under the control of the Eastern Roman Empire in the South could fairly be considered part of the Western Roman Empire. The Lombards ruled the North by right of conquest, and the Eastern Roman Empire—well, it was Eastern and not Western. By the eighth century the Western Roman Empire had thus shrunk to the small part of central Italy that remained under the direct control of the bishop and the people of Rome. That part, thought Conring, and nothing more than that part was what Charlemagne acquired in the famous ceremony on Christmas day AD 800 when Pope Leo III and the citizens of Rome acclaimed him as Roman Emperor.[35]

By this stage Conring had thus given a preliminary answer to the questions posed at the beginning of the *New Discourse*. At the time of Charlemagne the Roman Empire still existed in Western Europe, but it had shrunk to the area surrounding Rome.[36]

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34 *Discursus novus* 20.

35 *Discursus novus* 26–8, contains the arguments for Conring's sharp limitation of the significance of Charlemagne's imperial coronation. Crucial is Conring's insistence that Charlemagne ruled only the middle part of Italy as Roman Emperor, and that he ruled France and Germany not as emperor but as king, by rights that were entirely separate from those of the Roman Empire and derived from the events of the earlier Middle Ages.

36 I do not understand why Knoll, *Hermann Conring als Historiker*, 25, in his summary of Conring's *Exercitatio de Imperatore Romano Germanico* (HelmestadI: H. Müller, 1641)—the reader may remember that the text of the *Exercitatio* is identical to the *Discursus*—why Knoll maintains that Conring denied any continuity between the ancient Roman Empire and the empire founded by Charlemagne: "In Folge dessen steht das neu gegründete Kaiserreich in keinem inneren Zusammenhang mit dem früheren, sondern muss in jeder Beziehung von ihm getrennt werden und zwar wird diesem am besten dadurch Ausdruck gegeben, dass das römische Kaiserreich deutscher Nation eine selbständige Chronologie hat." Knoll's opinion is shared by Willoweit, "Kaiser, Reich und Reichsstände," 325: "Zu diesen Ergebnissen gelangt Conring durch den sorgfältigen Nachweis, dass zwischen dem antiken römischen Reich und der seit Karl d. Gr. und Otto d. Gr. erneuerten Kaiserwürde kein Zusammenhang besteht." But Conring proved precisely the opposite: the imperial dignity of Charlemagne and Otto was identical to its ancient counterpart. The only change was that it had been sadly reduced in scope. Conring merely denied that

What about the times following Charlemagne? It was perfectly conceivable that the Roman Empire could have begun to grow again. It could, for example, {748 | 749} have reconquered some of the areas it had lost to the Germans, or the Germans and the Franks could have subjected themselves to the Roman Emperor of their own accord.

In the following chapters Conring therefore went on to show that the pattern established by the time of Charlemagne applied even after the collapse of the Carolingian Empire.[37] He thought it was obvious that France, Spain, England, Sweden, and other states in the North and East of Europe never subjected themselves to the Roman Emperor and were never conquered by him either.[38] Thus no one could have reasonably claimed that those areas were part of the Roman Empire. But the same was not so obvious in the case of Germany and Italy.

Germany and Italy required rather more careful investigation, because ever since the renewal of the Roman Empire under Otto the Great the kingdoms of Germany and Lombard Italy had been linked to the Roman Empire, or what was left of it, by an everlasting alliance.[39] Moreover, unlike their Carolingian predecessors, the kings of Germany and Italy had only rarely taken the trouble to distinguish their rights as kings from their rights as Roman Emperors. Italy and Germany had regularly been referred to as the Roman Empire, as if there had been only a single state, and the rulers of Italy and Germany had regularly been referred to as Roman Emperors, as if there had been only a single ruler. In theory that could have meant, and in the view of many it did in fact mean, that Germany and Italy had been fused with the Roman Empire. But in Conring's view the facts were different.

The rulers of Italy and Germany had established their states on foundations that had nothing to do with the Roman Empire. It was a mere historical accident that they had been combined under the control of a single person who also happened to have gained ascendancy over the remnants of the Roman Empire. It did not mean that they had lost their separate existence in constitutional law. If Germany and Italy had ever subjected themselves to the

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Charlemagne's rights as Roman Emperor were identical to his rights as king of the Franks and Lombards. He did not deny the continuity between the Roman Empire existing in Charlemagne's time and that which had existed in antiquity.

37 *Discursus novus* 29–41. In these and the following chapters the Eastern Roman Empire, and consequently the distinction between Eastern and Western Roman Empire, largely disappears from sight until chapter 55, where Conring mentions the Eastern Roman Empire's inglorious demise under the onslaught of the Ottomans in the fifteenth century.

38 *Discursus novus* 29.

39 *Discursus novus* 30, 39.

Roman Empire that would have been an act of major importance that could not have been performed without the consent of the estates. But the estates had never given their consent to any such act. Hence it was clear that Germany and Italy had retained their separate existence as autonomous states. Perhaps the memory of their separate existence had not always been as clearly preserved as would have been desirable. But for all who cared to take a closer look it was plain to see that the rulers of Germany, Italy, and the Roman Empire were not crowned once and with a single crown, but in three different places, in Aachen, Pavia, and Rome, and with three different crowns, each of which nicely symbolized a different state.[40]

That cleared the way for a conclusive answer to the question about the relationship between Germany and the Roman Emperor in modern times: the emperor had no right to rule over {749 | 750} Germany at all and he had no right to rule over Italy either, except for that small area around the city of Rome to which the Western Empire had long since been reduced.[41] Only one monarch had the right to rule Germany, and that was the king of Germany. If the king of Germany happened to be elected Roman Emperor as well, that was just fine, but though it added a certain touch to his dignity, it added nothing at all to his rule over Germany. Germany and Lombard Italy were sovereign states ruled by their own kings. They did not belong to the Roman Empire and they were not subject to Roman law. If anyone had been subjected to anyone else, it was not Germans to Romans but the other way round.

A second conclusion followed almost seamlessly from the first: the pope had no right to interfere in the affairs of Germany.[42] The pope was not a citizen of Germany, but a citizen of Rome. Indeed, he was a particularly distinguished citizen of Rome and as such he did have certain rights in the Roman Empire. Those were precisely the rights that he had exercised when, together with the other citizens of Rome, he had conferred the Roman Empire on Charlemagne. Perhaps he even retained the right to remove the Empire from Germany. That right was doubtful, to be sure, seeing that the Romans had surrendered the right to elect the emperor to the Germans and the Germans had never given it back. But there was no reason not to be magnanimous and resolve the doubt in favor of the pope, at least for the time being.[43] For whatever rights the pope

40 *Discursus novus* 40.

41 *Discursus novus* 42–4.

42 *Discursus novus* 45–7.

43 In *De Germanorum imperio Romano* 10.23–9, *Opera*, 1:80–2, Conring was less magnanimous. There he asserted, on the basis of a complicated analysis of several documents whose authenticity had been disputed by Baronius, that the Roman Empire had been surrendered to Germany for good, and that no one was in any position to take it back.

might have resumed as a result, the Empire no longer amounted to very much. Hence the rights of the pope did not amount to very much either and they certainly included no rights at all over Germany itself.

That left the question whether or not the Roman Empire continued to exist at all.[44] Though reduced in size, it had definitely continued to exist at the time of Emperors Otto the Great, Otto III, and Henry III, who had exercised full imperial rights over the city of Rome, including the right to a decisive say in the election of the bishop of Rome. But Conring thought the fate of the Empire had taken a turn for the worse when Pope Gregory VII began to claim control over the empire for the papacy. Gregory's claims were as unprecedented as they were unfounded, and later emperors had done their best to reject them. But they had prevailed. For more than four hundred years the power of the emperor had thus not been exercised in Rome at all. Conring's conclusion in chapter 52 is worth quoting in full:

> I am not now going to analyze whether four hundred years of possession is enough for the popes to have acquired a genuine right over what they first took by force and crime, especially since in all of that time few emperors have disputed the case. But this, at least, seems certain: if after {750 | 751} so many years of prescription our kings and emperors have lost all those true and ancient imperial rights, then there is no longer any reason why some of them should vainly boast I know not what lordship over the world or the city of Rome, much less, why emperors elect should at great expense and in overwhelming danger march into Italy in order to obtain the imperial crown from the Roman bishop. The conclusion is not difficult to perceive: since the Eastern Roman Empire has long since been destroyed by the Turks and hardly anything of the Western Empire is left to our emperors except the imperial title, it is perhaps not wrong to affirm that either the Roman Empire has perished completely or, if you put aside the question whether or not the papacy had the right to usurp the imperial title and confer it on others, that the imperial power is actually in the hands of the Roman pope.[45]

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44 *Discursus novus* 48–52.

45 "Non disputabo nunc, an quadrigentorum annorum possessione id quod initio per vim et scelera peperunt sibi Pontifices nunc vere suum fecerint, praesertim quum tanto temporis spacio pauci Caesares idipsum videantur in controversiam vocasse; id certum videtur, si tot annorum praescriptione perierint nostris Regibus et Caesaribus omnia vera illa et antiqua Caesarum jura, non esse amplius quur vane jactent nonnulli nescio quod orbis aut Urbis Romae dominium, multo minus nunc esse magnis sumptibus et ingenti periculo in Italiam proficiscendum Caesaribus electis, quo a Romano Pontifice Caesaream

Here was Conring's answer to the chief question that the *New Discourse* had raised. Did the Roman Empire continue to exist today? That depended on your perspective. The eastern part of the Empire had been destroyed by the Turks and of the western part nothing was left except the title. From that point of view the Roman Empire had disappeared completely. On the other hand you could argue that, though the papacy had gained control over the Western Empire by usurpation, its rights had been made legitimate by four hundred years of prescription. From that point of view the imperial power did continue to exist, albeit in the hands of the papacy and sadly reduced in scope.[46] Yet in neither case was there any reason why the king of Germany should be regarded as Roman Emperor, much less as lord of the world. Kings of Germany who went to Rome in order to obtain a title {751 | 752} that was purely ceremonial from a spiritual ruler with a dubious right to bestow any such title were wasting time and money.

In the last three chapters of the *New Discourse* Conring summed up his case by answering three chief objections, one in each chapter.[47] These chapters are relatively brief, but they are important from a theoretical point of view.

First, it could be argued that his case conflicted with the Bible, because the Bible had been taken to prophesy that the Roman Empire would last until the

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coronam consequantur. Quin imo haud obscure hinc est dispicere, cum Orientale Imperium Romanorum per Turcam pridem sit destructum, nec Occidentalis quidquam pene supersit apud Caesares praeter nomen Imperatorium, haud injuria fortassis posse affirmari, vel Imperium Romanum funditus periisse, vel vero Papam Romanum reapse frui nunc potestate Imperatoria, si demas licentiam titulum illum usurpandi, aut in alium conferendi." *Discursus novus* 52. In chapter 52 of the revised edition of the *Exercitatio de Imperatore Romano Germanico* of 1674, Conring turned the conclusion on its head by adding the phrase "which cannot be admitted by any means" (*quod tamen neutiquam admitti potest*) in parentheses immediately following the words "all those true and ancient imperial rights" (*omnia vera illa et antiqua Caesarum jura*).

46 In the *De Germanorum imperio Romano* and in his revised edition of the *Exercitatio de Imperatore Romano Germanico* of 1674, Conring insisted that the rights of the papacy were unfounded and that the Empire, if it continued to exist at all, remained in the hands of the German king: "Since the popes had no right to remove the imperial power from themselves and the city of Rome, the imperial rights that were in effect until the times of Hildebrand evidently remain intact today, no matter how strong a blow the popes may have struck against them." *De Germanorum imperio Romano* 13.27, *Opera*, 1:107. But even there he allowed the possibility that the Roman Empire had disappeared entirely: "If, however, by 'Roman Empire' you mean that vast commonwealth whose rights belong to the city of Rome, as was once the case, that Roman Empire has altogether ceased to exist a long time ago." *De Germanorum imperio Romano* 11.12, *Opera*, 1:89.

47 *Discursus novus* 54–6.

end of the world.[48] That objection was founded on a certain interpretation of the book of Daniel, reinforced by the Apocalypse and by what Conring loosely termed the letters of the Apostles.[49] Daniel had predicted that four monarchies were going to succeed each other in ruling the world, and the common wisdom was that the fourth of those monarchies was identical to the Roman Empire. But once again the common wisdom was wrong in Conring's view. There had been many more empires than just four, and "the whole idea that there will be only four great monarchies or world empires is more of a rumor than a fact."[50] Besides, Daniel had not even mentioned the Roman Empire, nor could he have mentioned it, seeing that he had lived long before the Roman Empire came into existence. With a few words Conring thus disposed of one of the more successful doctrines ever invented to shore up Roman imperial ideology with Biblical texts.[51]

Second, it could be objected that Conring's case violated Roman law because Roman law had given the Roman Emperor the right to rule the world.[52] That was an objection that Conring had already disposed of at the very beginning of his treatise.[53] Now, having amassed enough historical evidence to substantiate the principles he had enunciated earlier, he returned to it with a vengeance. There was only one premise on which Roman law could be used as an objection to his case, namely, that the emperors of today enjoyed the same rights as the emperors of the past:

> That is precisely the kind of argument on which a great many professors of Roman law have relied from the times of Emperor Lothair down to our own age. Some of those professors are convinced that whatever once

48 *Discursus novus* 54. Conring had already mentioned divine law as a possible objection to his case in chapter 11, but there he had not dealt with Biblical prophesies.

49 Next to the Apocalypse, which resumes the imagery of Daniel, Paul's second letter to the Thessalonians is the main source for New Testament predictions about the end of the world.

50 "Totum illud de non nisi quatuor magnis futuris monarchiis seu Imperiis mundi, plus habet famae quam veri." *Discursus novus* 54.

51 How radical and (relatively) novel this aspect of Conring's case was is put into high relief by Seifert, *Rückzug der Prophetie*. Let it be noted, however, that there is a marked difference between Conring's unequivocal rejection of the prophecy of Daniel and the hesitant language with which he accepts the predictions of the New Testament. In the *New Discourse* he remains more than vague about the question how precisely the predictions of the New Testament are to be interpreted, much less how they are to be reconciled with his rejection of the prophecy of Daniel.

52 *Discursus novus* 55.

53 *Discursus novus* 11.

belonged to Emperor Justinian or even to Emperor Augustus must still {752 | 753} belong to our emperors today. Now that sort of teaching is certainly good for starting wars, promoting turmoil, and overturning the state. For, if everything is to be measured against the conditions of the age of Augustus, not only our own Germany but practically the whole world must be turned upside down.[54] But the reasoning of those professors is utterly frivolous, to put it mildly. It has no force at all—unless, of course, you assume that the people and emperor of Rome could not possibly have lost any of their rights in a legitimate way, or that every single piece in the body of Roman laws is founded on the law of nature and therefore true for all times. But such an assumption is completely unfounded. Most Roman laws are based on imperial constitutions, which means that they are positive laws. Any free state can therefore reject them or accept them as it pleases. And controversies between states cannot be settled on the basis of those laws either, as the great Hugo Grotius observes so well in the preface of his *De iure belli ac pacis* in response to Fernando Vázquez. It is simply silly to believe that someone who succeeds someone else in name or some other way must necessarily also succeed to rights that may have been in effect as long as hundreds or thousands of years ago.[55]

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54 Note that, at least for the sake of polemics, in the present context Conring was willing to speak just as loosely about "the whole world" as those "professors of Roman law" whom he blamed for failing to recognize the limits of the Roman Empire.

55 "Eo argumenti genere usos quidem perquam multos, a Lotharii Caesaris usque temporibus ad nostram hanc aetatem, eos qui Romani juris doctrinam professi sunt; quorum nonullis pene persuasum est, omnia omnino illa competere hodieque Caesaribus nostris, quae olim Iustiniano imo Augusto Imperatori convenerunt. Verum haec quidem doctrina apta est concitandis bellis, movendis tumultibus, evertendae reipublicae. Si enim omnia ad illam faciem Augustaei aevi sunt componenda, non haec tantum nostra Germania sed pene totus orbis erit commovendus. Est autem tota illa colligendi ratio frivola, ne quid dicam gravius. Nulla certe illi vis inest, nisi pro confesso et certo sumas: populum Caesaremque Romanum nihil potuisse jure amittere, aut vero omne quod in corpore illo Legum Romanarum reperitur id ex jure naturae venire adeoque aternae esse veritatis. Quae omnia longe sunt falsissima. Sane cum jura illa plaeraque valeant ex constituto sintque positiva, uniuscujusque est liberae reipublicae ea hactenus vel rejicere vel admittere: eoque nec rerumpublicarum controversiae recte ex illis possunt decidi, ut optime post Ferdinandum Vasquium observavit summus vir Hugo Grotius *praef. ad libr. de jure belli ac pacis*. Stultum vero est, omnem, qui in nomen aut aliquo modo succedit in locum, eundem etiam in jura que ante aliquot centum aut mille annos obtinuerunt, succedere." *Discursus novus* 55. Cf. Grotius, *De iure belli ac pacis*, "Prolegomena," § 55, ed. Kanter-van Hettinga Tromp, 26.

Finally, it could be objected that Conring was belittling the dignity of the emperor because he denied the emperor's right to rule the world and exempted even tiny states from his control by allowing them their own sovereignty.[56] The response to that objection was that the dignity of the empire hardly depended on the possession of a mere title. It depended on the actual power possessed by the kings of Germany. That power had always been, and still remained, considerable, regardless of whether you judged it by the extent of the realm of Charlemagne or that of Otto the Great. Hence Conring concluded: {753 | 754}

> If ever since the eighth century all other states have yielded first place to Germany and its kings or emperors, they surely did so with good reason. Since this dignity and the privilege of the first rank stem not so much from the imperial title as from the real extent of the Empire, and since Germany's possession of this honor has not been contested up to now, the rights of the German kingdom will remain intact even if you take the name of Emperor completely away.[57]

The *New Discourse on the Roman-German Emperor* thus closed with an implicit invitation to put an end to a long story and cut the age-old ties between Germany and the Roman Empire once and for all.

3 Two Unanswered Questions

It is hard for me to describe the mixture of surprise, pleasure, and amusement that I felt when I read the *New Discourse* for the first time. I had not known what to expect, but I had certainly not expected to find something I already

56 *Discursus novus* 56.

57 "Denique certum est, ab annis septingentis nullam rempublicam non ultro semper Germaniae ejusque Regibus aut Caesaribus primum locum concessisse. Itaque quum dignitas haec et προεδρία non tam a Caesareo titulo quam ab ipsa amplitudine Imperii veniat, et vero Germanicum regnum in quieta ejus honoris possessione hactenus fuerit, manifestum est, etiam si tollas omne Caesareum nomen, jus tamen suum Germanico regno permansurum integrum." *Discursus novus* 56. In chapter 56 of the revised edition of the *Exercitatio de Imperatore Romano Germanico* of 1674, Conring added the phrase "and that would be the greatest sacrilege" (*quod summum fuerit nefas*) in parentheses immediately following the words "even if you take the name of Emperor completely away" (*etiam si tollas omne Caesareum nomen*).

knew. It therefore took me a while to recognize what I was reading: it was the history I had been taught as a child in a German Gymnasium.[58]

To be sure, there were differences in detail and scope. The *New Discourse*, after all, is not much more than an outline. It left out things I had been taught and mentioned things I had not been taught. Certainly none of my teachers had ever supported Conring's conclusion that in early modern times the Roman Empire consisted of the area surrounding the city of Rome. But those are technical quibbles.

What mattered was the overall impression. There they all were: the Ostrogoths and the Visigoths, the Lombards and the Exarchate, the Franks and the Papacy, the imperial coronation of Charlemagne in 800, the collapse of the Carolingian Empire, the revival of the Empire under Otto the Great, the Investiture Controversy, the failure of the Staufen emperors to reverse the ascendancy of the papacy since Gregory VII, and so on. The names, the events, the turning points, the heroes and the villains—all of them were part of an old and familiar story that I had not heard in a long time and that I had not expected to find in a text from the middle of the seventeenth century.

There was only one important difference between the story that Conring told and the one that I had been taught in school: Conring's was more interesting. Why? Because it was told for a good reason. The reason consisted of the question with {754 | 755} which it opened: Did the Roman Emperor have the right to rule Germany? As far as I can remember that question had never been mentioned in my school. It had perhaps not even occurred to my teachers, understandably so, seeing that all of them had been born long after the official demise of the last Roman Emperor, which is usually dated no later than 1806. Nonetheless that question was the source from which the story told in the *New Discourse* drew meaning and purpose. The fate of the "Holy Roman Empire" depended on the answer, and the intensity with which it was debated at the time is still palpable on the pages of that little book.

It may thus very well be that Conring tried to write history objectively, "wie es eigentlich gewesen," in Ranke's celebrated phrase. But it is certainly not the case that he wrote it for its own sake.[59] He dealt with questions about the past in order to answer questions about the present; with questions about what had once happened in order to answer questions about right and wrong. He did not tell his tale merely in order to tell the truth. He told it in order to win. He told it in order to undermine the theoretical foundations of Habsburg absolutism. The future was at stake. That is what makes the *New Discourse* interesting.

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58 The Staatliches Beethoven-Gymnasium in Bonn, to be precise.

59 On this point I agree completely with Willoweit, "Hermann Conring" (1995), esp. 137, 141.

What you can see in the *New Discourse*, in other words, is a wonderfully concrete illustration for a statement often made in general terms, namely, that history is an integral element in the self-understanding of a community. More precisely, what you can see is an example of the self-understanding of a community in transition. Conring, after all, did not invent history out of whole cloth. Germans, like other Europeans, had for a long time had a definite image of their past. They had also had documents on which to base themselves—the Bible, for example—and they had been able to draw on a long interpretative tradition that had built a definite view of the past on a careful study of those documents. At least many learned Germans, therefore, like other learned Europeans, had been used to believe that they were living in the Roman Empire, and that the Roman Empire was the last of the four world monarchies, destined to endure until the end of the world.

It was that particular view of the past that Conring attacked. The chief weapon in his armory was the new form of history that exploited the critical reading of primary historical documents for the purpose of turning once-cherished beliefs about the past into unbelievable myths. Using that method allowed him to destroy the conventional picture of the past and to compel his learned readers to believe something entirely different: that the story of the four world monarchies was a fiction; that, for all practical purposes, the Roman Empire was gone; and that they were living in a modern sovereign German state with a history and a law entirely different from those of the Roman Empire. That was not a conclusion all of them liked. But like it or not, they could not avoid it—except by engaging Conring on his chosen ground and offering a different interpretation of the evidence that he brought into play; which is to say, they could not avoid it except by playing his own game. {755 | 756}

Nowadays the stakes are changed. By and large the story Conring told has proved to be convincing. The disputes in which he was engaged have been settled and his opponents have retreated. The Roman Empire has disappeared for good and there is no one left who still believes that the Roman Emperor has the right to rule Germany, much less the world. Conring, in short, has won.[60]

Conring's success raises two basic questions. The first is whether or not the history that he told is still worth telling. The purpose for which he told it is no longer a matter for live political debate, but has itself become a matter for historical analysis as, for example, in this article. Is there then any reason why his

60 I am speaking metaphorically. A properly designed poll might well demonstrate that a specifiable percentage of the population of, say, the United Kingdom or the Republic of China actually does endorse the right of the Roman Emperor to rule the world and, if enough people were asked, some of them might even lay a claim to his throne.

story still needs to be repeated? Or is it perhaps the case that histories can been used up, as it were? That the history presented in the *New Discourse*, precisely because it has fulfilled its purpose, can now be put on the shelf in order to make room for other histories that respond to the questions of our time (whatever those may be) as cogently as this particular story once responded to the questions of another time?

The answer is not at all obvious. There is something to be said in favor of abandoning certain forms of history because they are outdated, just as there is in favor of forgetting. Otherwise it would be hard to explain why we do not keep retelling the story of the four world monarchies. But there is also something to be said in favor of remembering, and a good deal more in favor of continuing old habits for new reasons. Perhaps there is even something to be said in favor of the study of the past for its own sake. Whatever the answer, one thing seems certain: if Conring's story deserves to be retold today, the reasons must be different from the ones by which he was inspired.

The second question is this: What explains Conring's success? How did he manage to turn the tables on Bartolus, disposing of his doctrines so effectively that they are now languishing on a dust heap in one of the more remote corners of the historian's universe?[61] The answer may seem obvious: Conring had the facts on his side; Bartolus did not. What more is there to be said? Who could possibly maintain that the Roman Emperor has the right to rule the world? Who could possibly deny that accurate historical knowledge is an indispensable prerequisite for understanding the present? Is Bartolus's statement that it is heresy to deny the Roman Emperor's right to rule the world not an obvious example of those benighted notions with which the Middle Ages are reported to have been replete? Does Conring's success really require any explanation beyond attention to the facts and common sense? {756 | 757}

It does, unless we wish to dismiss the possibility that facts, however accurately construed, may conflict with rights. It does, unless we wish to ignore Bartolus's reasoning and consider our agreement with Conring as sufficient proof that he was right. Bartolus was not a man with whom to trifle. For centuries a well-known proverb had it that you could not be a jurist unless you were

61 I do not mean to imply that Conring defeated Bartolus single-handedly. Conring obviously came late in a long series of authors who had argued along lines similar to those that he pursued. There is no doubt that he was indebted to them for many of his ideas, nor is there any doubt that some of his ideas, such as the distinction between divine, natural, and human law have an even older ancestry. Nonetheless it is useful to specify the intellectual issue at stake in terms of a conflict between Conring and Bartolus. Bartolus was the first author whom Conring mentioned by name in order to disagree with him. Conring clearly regarded him as the chief representative of the intellectual opposition.

a Bartolist.[62] Moreover, and this is the crucial point, Bartolus was perfectly well aware that the Roman Emperor did not in fact rule the entire world. Unlike Conring, however, he did not consider that fact a good enough reason to invalidate the emperor's rights. The emperor's lack of power was a complicating circumstance. It limited the meaning of his right to rule the world. But fact alone was not enough to answer a question of right. It is in the very nature of rights that they can persist independently of facts. How else could rights be violated? From Bartolus's perspective, the facts that limited the power of the emperor constituted a challenge to his intellect to demonstrate how facts and rights could be reconciled with each other—and his explanation of how the existence of the emperor's right to rule the world could be reconciled with the freedom of Western European monarchs, Italian city-states, and peoples beyond the orbit of Latin Christianity constitutes one of his claims to fame.[63]

Bartolus, in other words, had excellent reasons for maintaining that it was heresy to deny the universal lordship of the Roman Emperor. To specify those reasons in detail would go beyond the limits of this article, in part because Conring ignored them, in part because the matter is complex, in part because it is in scholarly dispute.[64] An analogy may help to clarify the fundamental issue.

Who rules the United States of America? To answer that question, some would turn to the Constitution, where we can read that, in order to meet several precisely defined purposes, the Constitution of the United States of America was ordained and established by "the People of the United States."[65] The answer to our question would thus appear to be: the People rule the United States of America.

Any historian worth his salt, however, would have little trouble proving that, whoever did ordain and establish the Constitution, it was certainly not "the People," but a rather small number of particular people who were gathered in a particular place for the purpose of writing that Constitution. Paraphrasing Conring, such a historian might argue that even a child can see that a few

62 For more information see below, chap. 15.

63 For details see Bartolus's commentary on the following laws: Dig. 2.1.1, s.v. 'ius dicentis,' nrs. 15–16; Dig. 2.1.3, s.v. 'imperium,' nrs. 3–5; Dig. 6.1.1, s.v. 'per hanc actionem,' nrs. 1–2; and Dig. 49.15.24, s.v. 'hostes,' nrs. 6–7, in Bartolus, *Opera*, 1:47^{ra-b}, 1:48ra, 1:172^{rb}, and 6:228ra.

64 See above, n. 28.

65 "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Franz, ed., *Staatsverfassungen*, 10.

people at a {757 | 758} constitutional convention a long time ago had no right to impose their will on the inhabitants of almost an entire continent today. Nor would it be difficult to make a similar case for the present. Most of the people most of the time have little to do with ruling the United States today except that every now and then they cast their vote to choose between various candidates who wish to rule the United States on their behalf—and a great many of them do not even do that. On the basis of such facts some might conclude that the Constitution is invalid.[66]

This analogy confronts us with a choice between two equally fundamental but contradictory positions about the meaning of the Constitution: either it is a valid rule of law that obliges us to behave in a certain way, or it is a purely historical document that tells us how certain people once did behave or thought they ought to behave while leaving us free to do as we please. Precisely the same choice was at issue between Bartolus and Conring. Bartolus treated Roman law as though it were a constitution; Conring treated it as a historical document. Why, then, *not* proceed like Bartolus?

The answer to that question, too, goes beyond the limits of this article. Yet one thing is certain: it does not depend on the facts that Conring marshaled in his *New Discourse*. However accurate those facts, the question is not about their accuracy, but about their meaning. Whoever tries to explain Conring's victory over Bartolus by pointing to the accuracy of his historical account, far from explaining anything, merely begs the question. For at bottom the conflict between Bartolus and Conring turned not on a question of fact but on a question of right.

66 Gilmore, *Argument from Roman Law*, 26–7, uses virtually the same analogy in order to clarify the issue. Commenting on the famous debate between Lothair and Azo about the rights of the emperor, he writes that "it was as if the President of the United States today were to ask two professors of government: To whom does sovereignty belong in these United States?" A historian would surely answer the President differently from a constitutional lawyer, and for very good reasons.

CHAPTER 11

Hermann Conring and the Republic of Letters

Montaigne, in one of his more famous essays, laid down this principle:

> I would like everyone to write what he knows, and as much as he knows, not only in this, but in all other subjects; for a man may have some special knowledge and experience of the nature of a river or a fountain, who in other matters knows only what everybody knows. However, to circulate this little scrap of knowledge, he will undertake to write the whole of physics. From this vice spring many great abuses.[1]

Those words express a taste for the particular and a contempt for empty theorizing that may be taken as emblematic of the skeptical opinion their author had of what passed for knowledge at the time. But their significance is more than personal. They resonate with the experience of early modern thinkers grown impatient with the uncertainty produced by violent disagreements over religious questions fundamental, but abstract. They spring from a mind both critical of knowledge and confident of facts of experience. They may be taken to set out one of the central convictions in the Republic of Letters. Leaving aside the uncomfortable question whether Montaigne's place in that republic was that of an upstanding citizen or a subversive saboteur, a taste for the particular and confidence in the experience of facts were precisely what enabled the Republic of Letters to endure, and even flourish, across religious boundaries while most other forms of community in Europe left their members little choice between bowing to demands for conformity and leaving.

This essay aims to shine a little light on the same Republic of Letters in which those words originated. It is inspired by the same taste for the particular. Not unlike Montaigne's man with some special knowledge and experience of the nature of a river or a fountain, the author of this {141 | 142} essay has a little

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1 Montaigne, "Of Cannibals," 288.

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scrap of knowledge that he would like to circulate. He will then also formulate some insights that he believes to follow from that scrap of knowledge. So as not to violate Montaigne's sane injunction against writing the whole of physics, he will refrain from writing more than a part of it. The gentle reader will determine whether or not that makes him guilty of the great abuses so properly indicted by Montaigne.

My little scrap of knowledge concerns Hermann Conring, a professor at the University of Helmstedt who lived from 1606 to 1681 and is less likely than Montaigne to have played the part of a subversive saboteur.[2] More specifically, it concerns a particular piece of Conring's writing, namely, the *Discursus novus de Imperatore Romano-Germanico* or *New Discourse on the Roman-German Emperor*.

The *New Discourse on the Roman-German Emperor* was published in 1642 by an unknown printer in an unknown location, probably the Netherlands, probably Leiden.[3] It was the first book in which Hermann Conring's ideas about the relationship between modern Germany and ancient Rome were presented to {142 | 143} the public.[4] But they were presented to the public without his knowledge and against his will. He never recognized the *New Discourse* as his own piece of writing and, as his editor Johann Wilhelm Goebel scrupulously noted, neither did his heirs.[5] That raises more questions about its authenticity and

2 For information on Conring's life and works see Stolleis, ed., *Hermann Conring* (1983). Also useful is the annotated exhibition catalog prepared by Herberger and Stolleis, *Hermann Conring* (1981). E. Moeller, *Hermann Conring*, though dated, is still by far the best biography. For a concise recent overview see Willoweit, "Hermann Conring" (1995). Conring's *Opera* were edited in six massive folio volumes and one index volume by Johann Wilhelm Goebel (Brunsvigae: Meyer, 1730). They include only what Goebel called Conring's "elegant" writings. They omit most of his contributions to confessional polemics and all of his writings on natural philosophy and medicine.

3 Conring, *Discursus novus* (1642). The *New Discourse* is not included in the *Opera*. On the place of publication see Conring's remarks in the preface to his *Exercitationes academicae* (1674), sig.):(():(1: "Ad hoc jam ante annos hosce triginta amplius prodiit alicubi (in Batavis, quantum intellexi) in lucem altera mearum Exercitationum, quae est *de Imperatore Romano Germanico*, solius mei nomine praefixo, additaque insolente, et illa quidem bellica tempestate periculi plena, inscriptione: *Discursus novi de Imperatore*." Note that he did not cite the title of the *New Discourse* correctly.

4 They had been developed throughout the 1630s and they were already present, though not systematically stated, in Conring's preface to his edition of Tacitus, *De moribus Germanorum* (Helmaestadi: Lucius, 1635; reprinted in *Opera*, 5:257–73). For an analysis of that preface see above, chap. 8. Cf. Hammerstein, "Historie bei Conring."

5 For Conring's rejection of the *New Discourse* see the preface to his *De Germanorum imperio Romano liber unus* (1644), sig.):(3^{v}, reprinted in *Opera*, 1:27. Goebel included the *New*

interpretation than can be studied here.[6] Suffice it to say that, Conring's rejection notwithstanding, the *New Discourse* is hardly any less reliable a witness to his thought than any of his other writings and in some respects significantly more reliable.[7] {143 | 144}

The *New Discourse* focused squarely on a few questions fundamental to the history of the Roman Empire and the self-understanding of early modern Europeans. Did the king of Germany have the right to call himself Roman Emperor? Did the Roman Empire still exist? And if it did no longer exist, had anyone inherited its rights?[8]

Those were familiar questions and they had a familiar answer. The familiar answer was, of course, that the king of Germany was Roman Emperor, and the Roman Empire did not only continue to exist, but was also expected to endure until the end of the world, because it was the last of the four world monarchies. Such, at least, was the common wisdom as Conring described it.[9] He mentioned Bartolus of Sassoferrato (1313/14–57) as a chief spokesman for that wisdom. For Bartolus was the most authoritative medieval interpreter of Roman law and had charged anyone who denied the Roman Emperor's right to rule the world with heresy.[10]

Discourse on his list of "scripta, quae auctor pro suis non agnovit nec heredes agnoscunt," *Opera*, 1:xxxvii–viii. Kelly and Stolleis, "Gedruckte Werke," 540, nr. 48, similarly note that Conring denied being the author of the *New Discourse*.

6 Those questions receive more detailed attention below, chap. 12, and in Fasolt, *Limits of History*.

7 The works most closely related to the *New Discourse* are Conring, *Exercitatio de Imperatore Romano Germanico*, resp. Bogislaus Otho von Hoym (HelmestadI: H. Müller, 1641), reprinted with telling revisions in Conring, *Exercitationes academicae* (Helmestadii: Typis J. Mulleri, 1674), 32–72, and again in *Opera*, 1:528–42; Conring, *De imperio Romano Germanorum disputatio prima*, resp. Johann Christian von Boineburg (HelmestadI: Typis Henningi Mulleri Acad. typ., 1643); Conring, *De Germanorum imperio Romano liber unus* (HelmestadI: Ex officina Henningi Mulleri acad. typ. Sumptibus Martini Richteri, 1644), posthumously republished in an expanded edition by Conring's son Hermann Johann (Helmaestadii: Hamm, 1694) and then reprinted in *Opera*, 1:26-107; and the *De Imperatore Romano Germanico discursus historico-politicus* included in Conring, *De imperii Germanici republica acroamata sex historico-politica* (Ebroduni: Apud Societatem, 1655), 275–309, a pirated collection of dissertations written under Conring's supervision. Cf. Kelly and Stolleis, "Gedruckte Werke," nrs. 47, 64, 66, 134, and 236.

8 *Discursus novus* 1–4. For a more detailed analysis of the *New Discourse*, see above, chap. 10.

9 For more on the common wisdom see, e.g., Goez, *Translatio Imperii*; Folz, *Concept of Empire*; and Hammerstein, " 'Imperium Romanum'."

10 For the charge of heresy against those who denied the emperor's right to rule the world see Bartolus's commentary on Dig. 49.15.24, s.v. 'hostes,' nrs. 6–7, in Bartolus, *Opera*, 6:228ra: "Et forte si quis diceret dominum Imperatorem non esse dominum, et monar-

Against the common wisdom Conring made three simple points. First, he noted that the ancient Roman emperors had never actually ruled the world. That was a plain matter of fact, amply confirmed by {144 | 145} newly acquired knowledge about parts of the globe that Roman emperors had not even known to exist, much less ruled.[11]

Second, he maintained that the ancient Roman emperors, whatever the real extent of their power, had never had the right to rule the world either. That was a matter of law. It was a little more complicated than the matter of fact, because it required Conring to describe three separate sources from which in his opinion the right to rule the world could have been derived. Those sources were divine law, natural law, and human law. But none of them gave the Roman Emperor the right to rule the world—or did so only in the dim light of what Conring considered to be grotesque misinterpretations.[12]

Third and finally, he demonstrated that the successors of the ancient Roman emperors had gradually lost most of whatever limited rights and powers their predecessors had ever held to begin with. This third point was by far the most complicated, because it required Conring to describe the fate of the Roman Empire from antiquity to the present.[13] But the conclusion was simple: either the Roman Empire had vanished from the face of the earth altogether, or it had been reduced to the city and environs of Rome and fallen into the hands of the papacy.[14] In neither case were kings of Germany well advised to waste time and money on journeys to Rome in the pursuit of a completely empty title.

This is a familiar argument.[15] Its specific formulation and some of its nicer touches were original to Conring, but its substance was borrowed from Grotius,[16] and the demise of the Roman Empire itself had been {145 | 146} announced long before by men as different from each other as Erasmus, Luther,

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cham totius orbis, esset haereticus: quia diceret contra determinationem ecclesiae." On Bartolus in general see Calasso, "Bartolo da Sassoferrato." The old study by C. N. S. Woolf, *Bartolus of Sassoferrato*, is still pertinent to the issues considered in this paper. For a recent study see Cavallar, Degenring, and Kirshner, *Grammar of Signs*.

11 *Discursus novus* 5–10.

12 *Discursus novus* 11–13.

13 *Discursus novus* 14–51.

14 *Discursus novus* 52–6.

15 For similar arguments made by other early modern authors see Kelley, *Foundations*; Neddermeyer, *Mittelalter*; and Seifert, *Rückzug der Prophetie*.

16 For the most important points of contact between Conring and Grotius see book 2, chapters 4, 9, and 22 in Grotius, *De iure belli ac pacis libri tres*, trans. Kelsey, 2:220–30, 310–19, 546–56. On Grotius in general see Hofmann, "Hugo Grotius," and Tuck, *Philosophy and Government*, 154–201. On Conring's borrowing's from Grotius see Seifert, *Rückzug der Prophetie*, 173–81.

and Bodin.[17] It is also a plausible argument, and it certainly carried the day. It thus helped to translate denials of the Roman Emperor's universal lordship from the heresy that they appeared to be to Bartolus into the perfectly commonplace truth they appear to be to us today.

What may be less familiar is that this argument was also sadly beside the point—at least the point that had been made by Bartolus.[18] For in spite of the impression Conring was at pains to give his readers, Bartolus was perfectly well aware that the Roman Emperor had never ruled the world at all. That part of Conring's argument was utterly irrelevant. The real question was about the emperor's right to rule the world, and to that question Bartolus had a most interesting answer. It turned on a certain interpretation of the title 'lord of the world,' *dominus mundi*, that the emperor was given in one of the more famous passages of Roman law.[19] In Bartolus's judgment the emperor's right to rule the {146 | 147} world did not at all conflict with the rights of sovereign rulers that were usually invoked against it, such as the right of the king of France to rule France without obeying any superior, as though he were "emperor in his kingdom," as the phrase went.[20]

In order to explain how this was possible, Bartolus used the analogy of a shepherd and his flock.[21] A shepherd did not need to own any of the sheep in his flock. Whoever did own the sheep was entitled to take them back home. But that did not at all mean that he was entitled to deny the shepherd his right to the flock as well. Conversely, the shepherd was not entitled to take any of the sheep back home, unless perchance he owned some sheep himself. But if anyone were to usurp his rights to herding the flock, he could go to court and sue the thief under the action known as *vindicatio* that Roman law reserved for owners wishing to assert their right to a piece of private property.[22]

17 See Erasmus, "Letter nr. 586," esp. 378; Luther, "Appeal to the Ruling Class," esp. 476–7; and Bodin, *Method for the Comprehension of History*, trans. Reynolds.

18 My understanding of the point made by Bartolus is based on a close reading of his commentaries on Dig. 2.1.1, s.v. 'ius dicentis,' nrs. 15–16; Dig. 2.1.3, s.v. 'imperium,' nrs. 3–5; Dig. 6.1.1, s.v. 'per hanc actionem,' nrs. 1–2; and Dig. 49.15.24, s.v. 'hostes,' nrs. 6–7, in Bartolus, *Opera*, 1:47^{ra-b}, 1:48ra, 1:172^{rb}, and 6:228ra. There is no scholarly consensus on the question what Bartolus actually thought about the matter; compare, e.g., David, "Contenu," with Willoweit, *Rechsgrundlagen*, 25–6, Skinner, *Foundations*, 1:10, and Pennington, *Prince and Law*, 197.

19 The passage is in Dig. 14.2.9.

20 On that phrase see Mochi Onory, *Fonti canonistiche*; Calasso, *I glossatori*; and Bossuat, "La formule 'le roi est empereur'."

21 See his commentary on Dig. 6.1.1, s.v. 'per hanc actionem,' nrs. 1–2, in Bartolus, *Opera*, 1:172^{rb}; cf. Costa, *Iurisdictio*, 194–8.

22 On *vindicatio* see Nicholas, *Introduction to Roman Law*, 100.

In precisely the same way, so Bartolus believed, the Roman Emperor had the right to rule the world. If anyone had taken that right away from him he, too, could have gone to court and sued the thief under the action of *vindicatio*.[23] (Admittedly Bartolus did not specify which court that might have been.) That did not mean that the emperor had the right to rule France, England, the Italian City states, or any of the other lands that had been legitimately exempted from his power. Bartolus not only realized, but positively insisted that France and the Italian city-states had every right to rule themselves. Yet he also insisted that their right to rule themselves did nothing to diminish their obligation to recognize {147 | 148} the emperor's right to rule the world. In Bartolus's opinion the emperor was "truly lord of the whole world."[24]

Conring did not even engage, much less answer, that argument. He treated Roman law as a piece of historical evidence, good for yielding information about the past, not good for governing contemporary life. Generations of scholarship have improved on the details of his analysis, but not on its basic premise. Stated with admirable clarity by Conring himself, the premise was that "first of all we need to know what actually or legally belonged to the Roman Empire at the time when Rome was flourishing."[25] From Conring's point of view, Roman law consisted of the rules a certain ancient people had once upon a time established for their city. It was impossible to understand those rules without knowing the circumstances under which they had been written. They needed to be placed in their historical context and they could not possibly apply to the whole world.[26]

From Bartolus's point of view, however, Roman law was something different from the rules an ancient people had once upon a time established for their city. It was the law of a sacred empire that God had sanctioned with his own authority.[27] Bartolus did not particularly care what actually or legally belonged

23 "Mundus est universitas quaedam: unde potest quis habere dictam universitatem, licet singulae res non sint suae. Unde si alius teneret mundum, ipse Imperator posset vindicare." Bartolus, *Opera*, 1:172^{rb}.

24 "Imperator est dominus totius mundi vere." Ibid.

25 "Principio autem sciendum est, quid olim florentibus Romanorum rebus ad Romanum Imperium pertinuerit, sive reapse, sive jure." *Discursus novus* 5.

26 "Iure porro civili urbis Romae non potuisse Romanis jus aliquod competere in terrarum orbem vel puero liquet. Qui enim totum terrarum orbem obliget, quod unus populus sua in urbe constituit?" *Discursus novus* 11. Note the rhetorical question, an obvious attempt to stifle the thought that there might be a plausible answer.

27 It is worth remembering that, in the very first words of the first prefatory constitution of the *Digest*, Justinian claimed that "it is by the authority of God that we rule our empire, which has been entrusted to us by the heavenly majesty," (*deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est*) and described Rome as "the

to the Roman Empire at the time when Rome was flourishing. He cared about what Roman law had to say about right and wrong right now. Roman law did not need to be placed in any context: it was the context. Nor did its authority require to be measured against the facts of experience: it was a fact of experience. More than that, it furnished a veritable standard of judgment for experience. {148 | 149} To use that standard as a source of information about the past was to abuse it badly. Roman law was a source of information about law and justice for the present, indeed, for all time.

Conring and Bartolus thus disagreed profoundly in their assumptions about the nature of authority and truth, the relationship between the parts of time, and the boundaries between fact and fiction. Their disagreement is a matter of more than merely technical interest. It signals a genuine incommensurability of the sort that Thomas Kuhn has identified in the history of science, except that this particular incommensurability is found in the history of thought about public order, as opposed to thought about nature.[28]

That is my little scrap of knowledge. Now for some physics. First, the attitude a person takes towards a text is part of an entire complex of relationships between that person and the world. A definite attitude to texts entails a definite attitude to things like nature, time, and power. It is part of a grammar, not of language, but of mind and therefore, to some extent, constitutive of the self and its place in the world.

At issue between Conring and Bartolus was therefore not merely the question whether or not the emperor was lord of the world. At issue was a new way of living in the world and of thinking about the world. That way was the way of the historian, which is to say, a person who knows that the meaning of a text is not a given, not a datum, not a fact (as Bartolus had thought), but a variable that depends on time and circumstance. Conring distinguished sharply between (stable) facts and (variable) words, *res* and *verba*. That was the tool with which he deprived the words of Roman law of the authority Bartolus had ascribed to them.[29] He ruled with sovereign freedom over texts, compelling their meaning to conform to facts of nature and the passage of time. He was a

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head of the world" (*caput orbis terrarum*), and that the very first title of his *Code* dealt with the Christian faith in general and the doctrine of the Trinity in particular. See Dig. const. *Deo auctore*, ed. Mommsen, 8–9; Cod. 1.1, *De summa trinitate et de fide catholica et ut nemo de ea publice contendere audeat*, ed. Krüger, 5–12; cf. Justinian, *Digest of Justinian*, trans. Watson.

28 Kuhn, *Structure*, esp. 175.

29 For a good statement of Conring's views on 'facts' and 'words,' see the preface to his *De hermetica medicina libri duo* (1669), sig.):():(2^{r}–3^{v}, i.e., unpaginated pp. 11–21 of the front matter.

critic of authority erroneously attributed to ancient writings and inflicted on dull-witted readers. He devoted his entire life to the task of enlightening such readers for the sake of liberating the present from the past.

For those very reasons the way of the historian was at one and the same time that of the natural scientist and of the loyal subject of a {149 | 150} sovereign state. Where the authority of texts is turned into a variable, something else must take its place—so long, at least, as authority itself is thought to be desirable. That something else was sovereignty in law and science in nature. Science and sovereignty are timeless complements to history. Both author laws, but their authority differs from the authority that medieval thinkers found in Roman law: it authors laws that have no past.[30] Both, therefore, are fittingly called absolute. What made them absolute was their exemption from writings whose authority had fallen to the claims of history—a point not always understood in scholarship that draws attention to actual limitations on absolute monarchy where only conceptual limitations are pertinent.[31] Science is not as often called absolute as early modern forms of monarchy, but Conring was consistent in calling it just that.[32] For science, as Conring understood it, drew its authority from unwritten facts of nature, just as sovereignty drew its authority from unwritten facts of politics. Precisely to the same extent that it demoted the authority of written texts, historical criticism thus elevated the authority of sovereignty and science.

That, it seems to me, is the key to understanding the logic of Conring's works. His writings have seemed bewilderingly disparate to later readers because they range over texts that have long since come to be parceled out among divided disciplines in such a way that the principle of their cohesion has been thoroughly obscured. But in his mind they were united. What united them was his frustration with the illegitimate authority ancient writings exercised over his times, and his determined effort to transform them into evidence

30 They differ mainly, it seems, in that the laws of nature are (or claim to be) valid for all time, whereas the laws of sovereigns are valid only for the time being.

31 Cf. Miller, ed., *Absolutism*, and Chittolini, Molho, and Schiera, eds., *Origini dello Stato*.

32 For example, in the preface to his edition of Tacitus's *Germania*, *Opera*, 5:258: "Manuductrix igitur severiorum scientiarum est historia, tantumque parit delectationis quantum scientiae atque artes quaelibet largiuntur. Sed hanc eius voluptatem atque hunc illius fructum percipere non est cuiusvis. Tantum enim iis id concessum est, qui communes leges atque praecepta universalia aut ipsimet suopte ingenio norunt construere ex singularibus eventis, aut vero a magistris hactenus ea didicerunt, ut ad absolutam omnibus numeris rerum scientiam nil praeter experimenta postuletur."

that could be pressed into the {150 | 151} service of sovereignty and science.[33] If Conring's writings are nowadays considered to belong to separate disciplines, that is entirely in keeping with his goals. It may even be regarded as a measure of his success in taming the authority of ancient writings and replacing them with that modern form of subjectivity whose cardinal expressions are science, sovereignty, and history. Not every early modern scholar had the breadth of mind or the determination enabling him to carry historical criticism to the lengths that Conring did, much less to combine it with the study of medicine and the search for a master science of politics.[34] But the conjunction of history, science, and politics itself was a matter of principle.

The key to the logic of Conring's works also opens a door on the Republic of Letters. Like Hermann Conring himself, the citizens of that republic served the early modern common good by turning written authorities into so many pieces of evidence for historical examination. Not all of them shared Conring's views on the past. There is no dearth of early modern scholars who praised the past or reconstructed it in ways that could not but have made Conring frown, for example Baronius and Kircher.[35] What united them was their agreement, not on the nature of the past, but on the necessity to build its image on foundations that could withstand both the critical examination of historians and differences of religious faith. It was precisely their shared acceptance of that necessity which made it possible for them to dispute, and hotly, the nature and value of the past without in any way infringing on the laws that governed the Republic of Letters. Bartolus had lived not merely in a different time, but in a different temporal universe.[36] {151 | 152}

The Republic of Letters thus promised its citizens the freedom of historically minded scholars to roam far and wide across the past without having to heed the claims of the past upon the present. That freedom was by no means unconditional. It did not contest, but presupposed, and thus corroborated, the novel authorities of science and sovereignty, albeit only indirectly, often without their recognition, and sometimes against their will. Hence their republic was justly called one of letters. Letters were the spirit they distilled from the authorities by their particularly artful practice of historical alchemy. Their art reached its peak when it succeeded in turning Sacred Scripture from a book of

33 For another perspective on the coherence of Conring's works see Stolleis, "Einheit der Wissenschaften." Cf. Grafton, "World of the Polyhistors."

34 See Conring, *De civili prudentia* (1662); cf. Dreitzel, "Conring und die Politische Wissenschaft."

35 Cf. Pullapilly, *Caesar Baronius*; Fletcher, ed., *Athanasius Kircher*.

36 I would like to thank Anthony Grafton for the question that permitted me to sharpen the point of this paragraph.

prophetic meanings into a book of ancient literature. It was completed by the kind of letters that are distinct from evidence by definition and have therefore come to be synonymous with 'literature' per se.[37]

It is hardly an accident that modern European literature has been divided along national lines, or that it flourished most memorably under the tutelage of those Western European sovereigns who managed most successfully to escape from the tutelage of the lord of the world.[38] If modern literature can be said to have a substance, nationality is part of it. Nor can it be an accident how wonderfully the Republic of Letters flourished in the Germanies. There the emperor continued to enjoy a far more vibrant life than used to be believed.[39] There the defense of the present from the past was a particularly urgent matter. Perhaps one may therefore call the cultural relationship between the Holy Roman Empire and the Western nation states in early modern times a symbiosis in which Latinate men of letters living under the shadow of the emperor focused their energies on history, so as to let their peers abroad write literature for scientists living under the bright light radiated by Sun Kings. {152 | 153}

The confidence inspiring historians, scientists, and men of state and culture during the rise of the modern world, however, was never fully justified. Treating a piece of text as a source of information with reference to time and treating it as a source of information without reference to time are both useful ways of looking at any kind of text, whether it happens to be law or not. Nor are they mutually exclusive. This essay, for example, can be read as an argument for a certain interpretation of Hermann Conring's *New Discourse* and then, assuming such to be the reader's pleasure, it can just as well be searched for clues about the (past) state of mind in which the author wrote it. Transforming written authorities into evidence thus was enough to displace the obligatory force of Roman law (and, later, Scripture) into past history and thereby to clear the way for sovereignty and science. But it was not enough to answer arguments that Bartolus had framed in altogether different terms.

As a result the charge of heresy was never really laid to rest. It merely disappeared behind the veil of incommensurability. Nor did the emperor simply vanish from the earth. Instead he was transformed into a ghost that haunts the

37 Hence the cardinal sin (and chief temptation) of historians has turned out to be the writing of novels—just as, conversely the cardinal sin (and chief temptation) of novelists has come to be the writing of history.

38 Anderson, *Imagined Communities*, makes a related point from a different perspective. The best-known attempt to develop a perspective on European literature as a whole remains Curtius, *European Literature*.

39 As has been thoroughly documented, on the basis of much recent work, by Aretin, *Das Alte Reich*, and Press, *Das Alte Reich*.

modern age. That ghost has never ceased to menace facts of politics and nature with the curse of irrational and inhumane brutality. It looms over Machiavelli, Hobbes, and Nietzsche; over politicians struggling to protect the common good from unconditional suspicions of partiality; over scientists indicted for the unintended consequences of their knowledge; and not least over historians waging a ceaseless exorcism to protect the present from the living dead. Cursed by that ghost, the lands where the Republic of Letters flourished went on to witness not only the progress of history, sovereignty, and science to victory, but also their descent from victory into madness. Whether or not that process has now run its course will not be clear until the boundaries between facts and texts and nature change once more as fundamentally as they were changed in early modern times.

CHAPTER 12

Author and Authenticity in Conring's *New Discourse on the Roman-German Emperor*: A Seventeenth-Century Case Study

Hermann Conring (1606–81) disavowed responsibility for the *New Discourse on the Roman-German Emperor* (1642) because it was a pirated reprint of a dissertation prepared by one of his students. A closer look, however, reveals that the *New Discourse* reflects Conring's most radical ideas more faithfully than do works indisputably written by himself, even those he wrote expressly in order to correct the misrepresentations of which the *New Discourse* was allegedly guilty. That suggests that concepts of authorship and authenticity may conceal the true relationship between writers and their ideas.

Sometime in 1642 a slender quarto volume, no more than forty pages long, with the title *Discursus novus de Imperatore Romano-Germanico* was published under the name of Hermann Conring.[1] Judged by the standards of the time, the title page was bare. It carried the name of the (supposed) author, the title, and the date of publication. That was all. No indication of the place where it was published, no mention of the printer, and none of the florid details with which

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1 Hermann Conring (1606–81) was a professor of medicine and, after 1650, politics at the University of Helmstedt, one of the leading intellectual centers in Protestant Germany at the time. Quite apart from his medical studies, he had a major impact on the rethinking of the relationship between religion, politics, and law in early modern Germany. He is now poorly remembered, but this is not the place to introduce the reader to his life and significance. For more information see Herberger and Stolleis, *Hermann Conring* (1981), and Stolleis, ed., *Hermann Conring* (1983). The old biography by B. Moeller has never been superseded. Johann Wilhelm Goebel edited most of Conring's works in six massive folio volumes and one index volume of *Opera*, but he omitted all of Conring's writings on natural philosophy and medicine, and most of his confessional polemics.

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seventeenth-century printers were happy to adorn the title pages of their books in a transparent effort to attract potential buyers.

The *New Discourse* was a small book, but it dealt with a big subject. Right from the start it turned to one of the fundamental questions for the self-understanding of early modern Europeans in general and early modern Germans in particular: Did the Roman Empire still exist, or had it long since {188 | 189} vanished from the face of the earth? The answer was both simple and provocative: either the Roman Empire had disappeared completely, or it had shrunk to an empty title and a tiny piece of land consisting of the city of Rome and its environs—a title and a piece of land that were now in the hands of the pope. In neither case was there any reason why German kings should continue to pretend that they were Roman emperors, much less why they should at great expense and no small danger to their persons attempt to march into Italy in order to have themselves crowned by the bishop of Rome.[2] Those were bold things to say at a time when many, and by no means only inconsequential, people still believed, or at least pretended to believe, that the Roman Empire was the last of four world monarchies, and was not going to vanish from the face of the earth until the world itself had come to an end.[3]

Towards the middle of 1643 the *New Discourse* fell into the hands of its supposed author, and he did not like what he saw.[4] He considered the publication of the *New Discourse* horrifying evidence for the depths to which contemporary morals had sunk. He would never have dreamed that anyone should have dared to publish so shoddy a piece of writing under his good name, especially not while he himself was still among the living. He was saddened by the

2 Conring, *Discursus novus* 52 (1642). Since the pagination differs from one version of the text to another, which can be confusing, and since the chapters of the *New Discourse* are mostly short, I am going to refer to chapters rather than pages. For an analysis of the argument of the *New Discourse* with further references to the literature, see above, chap. 10.

3 Conring's friend Jacob Lampadius, for example, began his account of the "Roman-German commonwealth" with the foundation of the city of Rome. See Conring's edition of Lampadius's *De republica Romano-Germanica* 2.1 (1671), *Opera*, 2:50. On Lampadius see Dietrich, "Jacobus Lampadius." There is a large literature on the broader issue; see, e.g., Lübbe-Wolf, "Bedeutung der Lehre," Neddermeyer, *Mittelalter*, and Seifert, *Rückzug der Prophetie*.

4 Conring had already expressed his unhappiness about the publication of the *New Discourse* in a letter of November 1642 to Johannes Schwartzkopf, the chancellor of Brunswick-Wolfenbüttel; E. Moeller, *Hermann Conring*, 76. In his preface to the *De Germanorum imperio Romano* (1644) of December 1643, *Opera*, 1:27, however, he stated that he obtained a copy of the *New Discourse* "six months" ago, about the middle of 1643. That suggests that he heard about the *New Discourse* in the fall of 1642, but did not actually see a copy until the summer of 1643.

cowardice that had stopped the printer from identifying himself or the place of publication on the title page. He was dismayed by the rapacious shrewdness with which that same printer had invented an "insolent" title for this "primitive supposititious child." He was appalled by the damage done to his reputation and he saw no other remedy to save his reputation than to do something he would much rather have avoided, namely, to write a better book on the same subject. That book was entitled *De Germanorum imperio Romano* or *The Roman Empire of the Germans*. It was {189 | 190} published in the first days of 1644, and it was in his preface to that book that Conring offered his unflattering assessment of the *New Discourse*.[5]

Those were strong words. Small wonder that Johann Wilhelm Goebel did not include the *New Discourse* in his edition of Conring's *Opera* but placed it on a list of "writings that the author did not acknowledge as his own and that his heirs do not acknowledge either."[6] Small wonder also that historians since then have more or less ignored the *New Discourse*.[7] But that is a pity, for the *New Discourse* was identical to a work entitled *Exercitatio de imperatore Romano Germanico* over whose publication Conring himself had presided in 1641,[8] that

5 "Nihilo tamen minus inventus est superiore anno qui libellum istum meo nomine evulgaret, titulo praescripto sane insolente *Discursus novi de imperatore* [sic], credo quo pelliceret emptorem et hedera suspenderetur vino alias minus vendibili, utque lateret fucus et suum et loci sui nomen dissimulavit typographus, corollariis aliisque praesectis. Id scriptum, cum ante hos sex menses in manus meas incideret, obstupui sane eo rediisse mores, ut quis tantum facinus ausus me vivo. Maxime dolui quod, suum locique sui nomen subticente typographo, libellus raram adeo prae se ferens frontem hac tempestate sequiorum facile suspicionem movere et notam famae meae possit inurere. Graviter profecto momordit me haec iniuria, praesertim cum exemplo forte careat, nec pro merito queat vindicari. Neque vero ego aliud restituendae in integrum existimationi meae (illam enim laesam crudo isto ac supposititio foetu non possum non credere) remedium potui excogitare, quam si ipsemet argumentum illud sumerem pertractandum. Ita ego coactus sum horas, quas proximis hisce septimanis potui ordinario labori suffurari, alienis illis studiis impendere." *Opera*, 1:27.

6 "Scripta, quae auctor pro suis non agnovit nec heredes agnoscunt." *Opera*, 1:xxxvii–viii. Kelly and Stolleis, "Gedruckte Werke," 540, nr. 48, similarly note that Conring denied being the author of the *New Discourse*.

7 References to the *New Discourse*, where they can be found at all, are cursory, for example, in E. Moeller, *Hermann Conring*, 94–5. The closely related *Exercitatio de imperatore Romano Germanico* (HelmestadI: H. Müller, 1641), is briefly summarized, but not analyzed, by Knoll, *Conring als Historiker*, and Willoweit, "Kaiser, Reich und Reichsstände."

8 Conring, *Exercitatio de imperatore Romano Germanico* (1641).

he had no qualms calling "my" *Exercitatio*,[9] republished in 1674,[10] and that Goebel had no hesitation whatsoever to include among Conring's *Opera*.[11] More important, the teachings of the *New Discourse* are, with a few telling exceptions, indistinguishable from those of a work that has with good reason been called Conring's chef-d'oeuvre on the constitution of Germany: none other than the very *De Germanorum imperio Romano* ostensibly written in order to supersede the shoddy scholarship of the *New Discourse*.[12] Far from shoddy, the *New Discourse* was, in fact, the first publication in which Conring's fundamental ideas about the relationship between Germany and the Roman Empire were {190 | 191} circulated to a larger audience. It was also the most pointed, which is almost certainly why it was reprinted in yet another pirated edition in 1655, long after the *De Germanorum imperio Romano* had appeared in print.[13]

What are we to make of this curious state of affairs? What is the relationship between the *New Discourse*, which Conring rejected, the *Exercitatio de imperatore Romano Germanico*, which he published and republished, and the *De Germanorum imperio Romano*, which is acknowledged to have been one of his most important writings? Does any of them furnish authentic access to his thought? Of which was he the author? The purpose of this article is to throw some light on these and broader questions of authorship and authenticity by tracing the publishing history of the *New Discourse* in detail.[14]

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9 He called it "altera mearum exercitationum, quae est *De Imperatore Romano Germanico*" in Conring, *Exercitationes academicae* (1674), sig.):():(1r.

10 Under the title *De Imperatore Romano Germanico* in Conring, *Exercitationes academicae* (1674), 32–72.

11 *Opera*, 1:528–42.

12 Herberger and Stolleis, *Hermann Conring* (1981), 47, call the *De Germanorum imperio Romano* (1644) Conring's "staatsrechtliche Hauptschrift."

13 Under the title *De Imperatore Romano Germanico discursus historico-politicus* in Conring, *Acroamata sex* (1655), 275–309. On the title page of the *Acroamata sex*, it is singled out for special attention with the slightly different title *Tractatus de Imperatore Romano Germanico*.

14 The evidence for this history consists mostly of the title pages of the various printings that will be mentioned below, the results of a close comparison of the texts in question, the preface to the *De Germanorum imperio Romano* in *Opera*, 1:26–7, and the preface to Conring, *Exercitationes academicae* (1674), sig.):():(1r–2r. The latter is a particularly valuable source of information for Conring's attitude to the dissertations written by his students, but one that was unfortunately not reprinted in the *Opera*.

1 The Original of 1641

The publishing history of the *New Discourse* began, so far as we can tell, not long before 8 May 1641.[15] That was the day on which a student by the name of Bogislaus Otho von Hoym submitted an *Exercitatio de imperatore Romano Germanico* or *Exercise on the Roman German Emperor* to a public examination at the University of Helmstedt over which Conring was presiding.[16]

At the time such examinations had two rather different functions.[17] One, not unlike dissertation defenses today, was to certify that the student deserved to be awarded an academic degree. The other was merely to demonstrate that the student had understood his professor's lectures, without entitling him to any degree. In both cases such examinations were conducted in public and based on a printed text that was derived from the {191 | 192} lectures of the professor who presided over the examination. Sometimes the student wrote the text, sometimes the professor, sometimes both, but there were few cases in which the professor's lectures did not ultimately furnish the basis both of the examination and of the accompanying text.

These texts were referred to as *theses, exercitationes, disputationes*, or *dissertationes*—all of them varieties of the same literary species with subtle differences that are impossible to define with precision except in concrete instances. Theses that were printed for an examination of the more elevated type and led to the award of a doctoral degree were usually identified as "inaugural" dissertations. Inaugural and non-inaugural dissertations could vary enormously in length and presentation. Some consisted of a single page containing a few tersely stated theses. Others were longer than a hundred pages containing not only many different theses but also detailed arguments and copious evidence in support of each thesis, along with ornate prefatory matter like dedications, gratulations, and letters to the reader.

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15 Only so far as we can tell, because we do not know enough about the development of Conring's thought from the time when he first began to devote himself to the study of the empire in 1632, via the beginning of his lectures on the empire in about 1634, to the appearance of his first dissertations on the empire in 1641; see E. Moeller, *Hermann Conring*, 64–5, and Kundert, "Conring als Professor," 403.

16 Bogislaus Otho von Hoym was one of Conring's less distinguished students. We know about him only that he belonged to an old noble family with an ancestral seat near Quedlinburg. See *Neue deutsche Biographie, Allgemeine deutsche Biographie*, and *Deutsches biographisches Archiv*, where several other and more distinguished members of the family are mentioned.

17 The following account draws heavily on Kundert, *Katalog der Disputationen*, esp. 44–67, and Schubart-Fikentscher, *Untersuchungen.*

Often these *theses, exercitationes, disputationes*, or *dissertationes* concluded with a separate set of briefly stated theses known as *corollaria*. The *corollaria* usually made points that were not addressed directly in the body of the text, but were so closely related to points that were addressed in the body of the text that both stood or fell together. Their function is not altogether clear, but the student was probably expected to prove their validity in the course of his examination by demonstrating how they followed from the substance of the dissertation. In this fashion he could demonstrate his mastery of the subject matter while at the same time maintaining a certain distinction between his professor's authority and his own. The professor presided over the examination and had given the lectures underlying the text of the dissertation. The student demonstrated his grasp of the subject by his ability not only to clarify the arguments made by the professor but also to extend them to a defense of *corollaria* for which the dissertation itself contained no explicit justification.

Such was precisely the case with Bogislaus Otho von Hoym's *Exercitatio de imperatore Romano Germanico*: the title page announced the date of the examination, named Hermann Conring as the presiding examiner, and spelled out that the text was mostly (*praecipue*) based on Conring's lectures.[18] The text, divided into fifty-six numbered theses and printed on forty-four unnumbered pages, served as the foundation for a public academic exercise {192 | 193} of the lesser variety, not an inaugural dissertation, and it concluded with seven *corollaria*.[19] As with so many other seventeenth-century dissertations, one may therefore wonder who exactly wrote the *Exercitatio de imperatore Romano Germanico* and how accurately it represented the views of Hermann Conring. But there is no doubt at all that it is an authentic record of the text that Bogislaus Otho von Hoym defended and that Hermann Conring approved for publication in May of 1641.[20] In order to distinguish this original text from the

18 The full title was *Exercitatio de imperatore Romano Germanico, quam ex discursibus praecipue viri clarissimi, excellentissimi, atque experientissimi Hermanni Conringii, philosophiae ac medicinae doctoris huiusque in illustri Iulia Academia professoris celeberrimi, fautoris ac praeceptoris plurimum honorandi, desumtam eodem praeside examini publico submittit Bogislaus Otho ab Hoym, eques Pomeranus, ad diem IIX Maii, in Novo Iuleo Maiori.*

19 To give two examples: the first corollary declared that "the emperor in his role as king of Germany is the chief prince of the Christian world" and the last declared that "the law of nature does not forbid taking large parts of the ocean into private possession."

20 The Dukes of Wolfenbüttel, in their capacity as rectors of the University of Helmstedt, reserved the right to approve or disapprove the publication of any works written at their university. Since the number of such works was considerable, they had delegated the responsibility for exercising that right to the deans of the various university faculties. Each dean was expected to examine every text to be printed by a member of his faculty before permitting its publication; Kunder, *Katalog der Disputationen*, 56. It thus seems

other versions in which it appeared later on, I shall refer to it as the *Exercitatio* of 1641, or von Hoym's *Exercitatio* of 1641.

Later on, in the preface to the *De Germanorum imperio Romano*, Conring would maintain that von Hoym clearly identified himself as the author (*auctor*) of the *Exercitatio* of 1641, that he had taken only some matters (*nonnulla tantum*) from Conring's lectures (*discursibus*), and taken the rest from elsewhere (*aliunde*).[21] But that is thoroughly misleading. Von Hoym did say that his dissertation was mostly (*praecipue*) based on Conring's lectures. If it was "mostly" based on Conring's lectures, one may of course assume that it must "partly" have come from elsewhere. But von Hoym left it entirely open how much, if anything, he actually did take from elsewhere, and he said nothing at all about what "elsewhere" might have meant. Given the great similarities between the *Exercitatio* of 1641 and the *De Germanorum imperio Romano* of 1644 to be described below, it seems likely that whatever he did take from other sources amounted to very little—if it amounted to anything at all. The "mostly" in the title of his *Exercitatio* could easily have served him as a fig leaf with which to disguise the scarcity of his own contributions (a sentence here, a reference there?). Perhaps there were no such contributions at all, or the "mostly" may have been a hedge against the charge that he had failed to report Conring's views with the necessary precision. What matters most, however, regardless of the extent of von {193 | 194} Hoym's own contributions, is this: von Hoym described himself as a "Pomeranian knight," but certainly not as the "author" of the *Exercitatio*—a point Conring must surely have noticed since he himself had once been careful to describe himself as "A. & R.," i.e., "author and respondent" of a dissertation he had written while a student in Leiden.[22]

If von Hoym's *Exercitatio* of 1641 had been a run-of-the-mill thesis, his examination might very well have been the last that anyone would hear of it. Throughout the seventeenth century, at universities in Germany and elsewhere, year in year out, such theses were duly published and defended with dulling regularity by students who rarely looked back to what was seldom more than a simple demonstration that they had understood their teacher's Latin lectures or, at best, a ticket of admission to a career in public or academic

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likely that von Hoym's *Exercitatio* was given at least formal approval by the dean of the faculty of philosophy.

21 "Biennium scilicet est et quod excurrit, cum adolescens quidam libellum thesium *De Imperatore Romano Germanico* academiae huius examini submitteret, me praeside, ut loquuntur, defendendum. Professus ille aperte erat semetipsum auctorem scripti, nonnulla tantum meis discursibus deberi, reliqua aliunde esse desumpta." *Opera*, 1:27.

22 The *Theses variae de morali prudentia* (1629), whose dedication Conring signed "Hermannus Conringius, A. & R."

service. Thousands and tens of thousands of such dissertations have been preserved in European libraries. How many of them have been read since the day they were defended is doubtful. Only very recently have historians begun to pay closer attention to the massive amount of information they contain about early modern intellectual life and the conditions by which it was shaped.[23]

But von Hoym's *Exercitatio* was not run-of-the-mill. It dealt with one of the most important constitutional questions of the day and it contained some rather radical conclusions presented in unguarded language. It was also the first time that Conring's ideas about the emperor and the relationship between Germany and the Roman Empire were put into print.[24] It would not take him much longer to establish his reputation as a leading interpreter of the history and law of the German empire. Only two years later, in 1643, he was going to publish the *De origine iuris Germanici commentarius historicus*, a genuine milestone in the long debate on the relationship between Roman law and the German constitution.[25] Hence the *Exercitatio* was going to receive more than the usual amount of attention, recur in more different printed versions, and have a longer life than was common for dissertations.[26] {194 | 195}

2 The Unauthorized Reprint of 1642

The first of those other versions was, of course, the *New Discourse on the Roman-German Emperor*, that "primitive supposititious child" whose birth Conring found so distressing. It was published about one year after von Hoym's *Exercitatio*, in an unknown place, but probably in the Netherlands.[27]

23 For pointed assessments of their value, the difficulties they present to researchers, and the reasons why they have been ignored in the past, see Wieacker, "Zum Geleit," and Evans, "German Universities."

24 The most important earlier occasion on which Conring had addressed that subject in writing was the "Praefatio de historiarum, Germanorum inprimis, studiis" in his edition of Tacitus's *De moribus Germanorum* (1635). But there he dealt with the relationship between Germany and Rome only coincidentally, because his emphasis was on the principles of historical study. For details see above, chap. 8.

25 It remains his most frequently invoked work today. See Conring, *Der Ursprung*, the recent translation by Hoffmann-Meckenstock and Stolleis. See also Luig, "Conring," Gross, *Empire and Sovereignty*, 255–92, and the older work by Kossert, *Conrings rechtsgeschichtliches Verdienst*.

26 On the frequency of reprinted dissertations in general see Kundert, *Katalog der Disputationen*, 77–85.

27 Conring himself believed that it was in the Netherlands: Conring, *Exercitationes academicae* (1674), sig.):(():(1^{r-v}; cf. below, n. 37.

I have previously said that the *New Discourse* is identical to von Hoym's *Exercitatio*. But that is not literally true; there are differences. Most of them are insignificant except perhaps to bibliographers.[28] But some are interesting. Misprints in von Hoym's *Exercitatio*, for example, were sometimes corrected in the *New Discourse*.[29] There is even a reference to Grotius's famous *De iure belli ac pacis libri tres* that was misprinted in von Hoym's *Exercitatio*, but corrected in the *New Discourse*.[30] Clearly, whoever printed the *New Discourse* was either knowledgeable enough to recognize a garbled reference to an important statement by Grotius at first sight, or careful enough to check. On the other hand there are also perfectly obvious misprints in the *Exercitatio* that were not corrected in the *New Discourse*.[31] There are even a few entirely new misprints that had not yet existed in von Hoym's *Exercitatio*.[32] Evidently the effort to correct misprints was only intermittent and not enough to prevent the introduction of new errors. {195 | 196}

The most important differences between von Hoym's *Exercitatio* and the *New Discourse*, however, are of an entirely different nature. They occur at the beginning of the text and at the end. At the beginning, on the title page, the *New Discourse* bears only the name of Hermann Conring, the new title *Discursus novus de imperatore Romano-Germanico*, and an indication that

28 The *New Discourse* has a different typeface, a different layout, and slightly fewer pages than von Hoym's *Exercitatio* (forty, as compared to forty-four). The choice of italic type (for quotations and references) as opposed to Roman type (for the rest of the text) is not always the same. The two works also spell and capitalize a number of words differently, and not always consistently.

29 For example, at the end of chapter 21 the misprinted year "735" is corrected to "753" in the *New Discourse*.

30 The reference occurs at the very end of chapter 20. The question there is whether or not prescription (the Roman legal principle by which the uncontested possession of something over a certain length of time is sufficient to earn the possessor property rights over his possession) is founded on the law of nature—an absolutely crucial ingredient in Conring's argumentation. The *Exercitatio* refers to Grotius, *De iure belli ac pacis* 1.4, where Grotius actually dealt with wars of subjects against superiors. In the *New Discourse* the reference is corrected to *De iure belli ac pacis* 2.4, "On Assumed Abandonment of Ownership and Occupation Consequent Thereon; and Wherein this Differs from Ownership by Usucapion and by Prescription"; Grotius, *De iure belli ac pacis*, trans. Kelsey, 2:220–30. Grotius supplied Conring with some of the most important and fundamental doctrines on which he relied in the *New Discourse*. For more information see Hofmann, "Hugo Grotius," and Tuck, *Philosophy and Government*, 154–201.

31 In chapter 23 the dating of an act of King Pippin to the obviously misprinted year "71" is not corrected to "771" in the *New Discourse*.

32 In the middle of chapter 27 the *New Discourse* refers mistakenly to Otto of Freising's *Chronica* 2.28, where Hoym's *Exercitatio* had correctly referred to 5.28.

it was published in 1642.[33] At the end it omits the seven *corollaria* that were printed on the final two pages of von Hoym's *Exercitatio*. The *New Discourse* thus suppressed any information about the academic setting in which the text had originated at the University of Helmstedt and it concealed the identity of the student or "respondent" who had submitted it to public examination under Conring's guidance. It even dropped the word *thesis* from the numbering of the first chapter on the first page of the text. All of this led readers to believe that they were being offered 'chapters' in a 'book,' as opposed to the consecutively numbered 'theses' of an academic 'exercise.'

These may not seem like major differences either. Their effect, however, was to transform the nature of the work. We should not let ourselves be deceived about the *Exercitatio* of 1641 by the fact that it was printed like a book. Printing was simply the most efficient means available for distributing any written text for discussion, regardless of whether the discussion was to be conducted by students and faculty at one particular university or readers of Latin all over Europe. Dissertations printed by the Helmstedt printers were only meant to circulate within the classrooms of the university, in order to be read and commented upon by other students. They were accessories to an event whose essence consisted of the student's live performance.[34] They were not, or only coincidentally, meant to reach an audience beyond the university. Had more modern technologies been available at the time, the *Exercitatio* of 1641 would have been photocopied or placed on a publicly accessible computer.

The *Exercitatio* of 1641 thus was not a 'book.' It was a 'paper' intended to serve as the written basis for the oral examination of a student. That is what it was, and that is how it presented itself to its readers. The *New Discourse*, on the other hand, presented itself as a work written and published by Conring himself for dissemination to the European reading public. It was one thing to discuss the constitution of the empire in the context of a university examination, as Bogislaus Otho von Hoym had done in the *Exercitatio*. But it was something altogether different to step forward with such a discussion and invite a European audience to a public debate with Hermann {196 | 197} Conring, as the printers of the *New Discourse* had done—especially at a time like the early 1640s, when the Thirty Years War was still several years away from a peaceful conclusion.

In order to grasp the difference, it may be useful to invoke the distinction between locutionary content and illocutionary acts that Quentin Skinner has

33 The title page of the *New Discourse* in its entirety reads: "Hermanni Conringii Discursus novus de imperatore Romano-Germanico. Typis exscriptus 1642."

34 Kundert, *Katalog der Disputationen*, 56–8, and Wieacker, "Zum Geleit," 11–15, both insist on this point.

so successfully applied to the history of political thought.[35] 'Locutionary content' consists of things that people say (or by extension, write). 'Illocutionary acts' consist of things that people do in saying whatever they happen to be saying (or writing).[36] The distinction is necessary because the very same words can be used to convey entirely different meanings. A 'good morning' spoken to a child just woken by a parent not long after sunrise, for example, has an entirely different meaning from a 'good morning' spoken by a professor waking a student in his class during a lecture at some point in the early afternoon. The locution is the same, but parent and professor are doing different things with it.

Illocutionary acts determine the meaning of words and sentences on a more fundamental level than does locutionary content. Locutionary content is like the ripples on the surface of a pond. Illocutionary acts are like the spring from which the pond is fed. Yet in spite of their importance, illocutionary acts are supremely difficult to study, precisely because they differ from whatever words happen to be spoken. Words spoken are easily studied and words written more easily still. Words are code; unspoken acts are not. Different unspoken acts are usually expressed in spoken words that differ from each other precisely because they are meant to convey different illocutionary acts. In such cases the difference between unspoken acts and spoken words remains invisible, as it were. The different unspoken acts are so deeply embedded in the different words by which they are expressed as to be indistinguishable from them. That makes it fatally easy to assume that different words all by themselves are what conveys the different meanings—as if code were identical to meaning.

Sometimes, however, illocutionary acts emerge from beneath the surface by which they are ordinarily concealed. They do so most obviously when identical words are used to convey different meanings. When the locutions are identical and yet their meanings obviously different, it becomes clear that the locutionary surface must never be confused with the illocutionary substance; that the code is not the same as the meaning. That is the main reason {197 | 198} why it is worth the effort of comparing the words of different authors on the same question, or different writings by a single author, or different works by different authors over time in order to track down instances in which identical (or nearly identical) words were spoken in different circumstances. Not at all, as one might think, because identical locutions establish identical meanings (a cardinal fallacy) but, far more basically, because identical locutions furnish

35 For a convenient collection of essays by Skinner and his critics on this and related methodological questions see Tully, *Meaning in Context*.

36 Hence the title of the lectures in which John L. Austin first made the point: *How to Do Things with Words*.

a precious opportunity to grasp the illocutionary act that they embody, and thus to determine what the author really meant.

The rare occasions on which identical words can be found to have been used for different purposes are therefore moments of great excitement for anyone interested in meaning. Those are the moments when it seems possible to perceive speech action directly, as it were, divested of the clothes in which it is usually dressed. Those are the moments when it seems possible to communicate directly with the speaker, to go beyond the code and grasp meaning without mediation. Those are the moments when we believe we really understand.

Comparing the *Exercitatio de imperatore Romano Germanico* with the *New Discourse* leads to precisely such a moment. Von Hoym's *Exercitatio* had the same locutionary content as the *New Discourse*: both were using the same words. But they were performing different illocutionary acts. That is exciting for us, because it promises us the pleasure of looking through the surface of Conring's words and discovering what he really meant. It was exciting for Conring, too, although for very different reasons. He, too, was looking through the surface of his words and discovered what someone really meant, except that the someone was an anonymous printer who had turned his words to a purpose that he had not intended. We may leave it undecided whether or not the printer was really motivated by the greed that Conring attributed to him. Perhaps he was motivated also by a commendable desire to bring Conring's ideas to the attention of an audience beyond the walls of the University of Helmstedt. Whatever his motivation, he did perform an illocutionary act of which Conring did not regard himself the author. Leaving aside, for the moment, the question whether Conring did or did not subscribe to the locutionary content of the *Exercitatio de imperatore Romano Germanico* and the *New Discourse* (whether or not he approved their words and sentences), as well as the further question whether he did or did not subscribe to the illocutionary acts performed by the *Exercitatio de imperatore Romano Germanico* (whether or not he approved what von Hoym was doing in putting those words and sentences into print and defending them in public), there is no doubt at all that he angrily disapproved of the illocutionary acts performed by the *New Discourse*. In the *New Discourse* Conring found his words, or at the very least the words of a student that he {198 | 199} had approved in a public examination, turned against himself. His excitement did not manifest itself in the pleasure of understanding that we may feel upon comparing the *New Discourse* with the *Exercitatio de imperatore Romano Germanico*, but in the anger of an author who discovered that someone whom he did not even know had turned his words to a meaning he did not wish them to have. He had been robbed.

There is nothing more frustrating for speakers and writers than the possibility that their audience may fail to follow across the great divide between words and meaning—may fail to grasp the illocutionary act below the locutionary surface, may fail to get 'it'; nothing more frightening than that the audience may walk away believing to have understood when it has done nothing of the kind; and nothing more enraging than having one's words turned against oneself by someone deliberately taking malicious advantage of the difference between words and meaning. That is what Conring must have felt on reading the *New Discourse*. The printers of the *New Discourse* had turned his words against him by making them 'his' words. His anger was the anger of speechlessness.

What provoked Conring's anger was thus not simply that von Hoym's *Exercitatio* had been reprinted without his permission. It was that reprinting the *Exercitatio* under the title of a *New Discourse on the Roman-German Emperor* identified his name in public with radical ideas about the empire under "a title that was not only insolent, but even dangerous at a time when war was still raging," as he was going to put it more than thirty years later.[37] It exposed him to a certain risk that may well not have been as large as he imagined or pretended, but that was not negligible and to which he had in any case not given his consent. By suppressing all mention of Bogislaus Otho von Hoym and the academic setting in which the *New Discourse* had originated, it pretended to a degree of authenticity and authority that Conring had not wished to claim—at least not yet and not in public. Authenticity, because the ideas were presented as Conring's 'own.' And authority, because they were presented as the author's considered judgment, his 'discourse,' published for dissemination to the educated European public. In this fashion the publication of the *New Discourse* left Conring straining for speech. That explains the vehemence of his reaction.

Conring's anger, however, must not be allowed to obscure the central fact about the relationship between von Hoym's *Exercitatio* and the *New* {199 | 200} *Discourse*. That fact is this: the text of the two versions is word for word the same.[38] On the locutionary level, the words of the *New Discourse* were Conring's own or, at the very least, the words of a student to which he had given his formal approval in a public examination. The 'legitimate child' and the

37 "Ad hoc iam ante annos hosce triginta amplius prodiit alicubi (in Batavis, quantum intellexi) in lucem altera mearum exercitationum, quae est *De Imperatore Romano Germanico*, solius mei nomine praefixo, additaque insolente et illa quidem bellica tempestate periculi plena inscriptione *Discursus novi de imperatore* [sic]." Conring, *Exercitationes academicae* (1674), sig.):(():(1r–v.

38 Excepting the mechanical differences and typographical errors described above.

'supposititious child' may have worn different clothes, even have done different things. But on the evidence of their bodies they were identical twins.

We can only speculate about the circumstances that led to the publication of the *New Discourse*. Perhaps Bogislaus Otho von Hoym had a hand in it. More likely it was someone else, someone who was familiar with Conring's work or had come across the *Exercitatio* of 1641 by accident, but in any event someone who was convinced that its contents were too interesting to languish in the relative obscurity of a Helmstedt dissertation.[39] We do know that Conring had nothing to do with the publication of the *New Discourse* and never managed to find out exactly who did, or at least did not say so in any recorded piece of information.[40] We also know that he disapproved of it vehemently. The *New Discourse* was a pirated edition to which he had not given his approval, masquerading under his good name as if he were its author, as if this were the best he had been able to say on a subject of such great significance.

It was not the best, or at any rate not the most exhaustive. Conring soon set about repairing whatever damage he feared the publication of the *New* {200 | 201} *Discourse* had done to his reputation.[41] Publicly, he declared his unhappiness about having to take time away from his medical research and

39 Conring may well have suspected John Maire, one of the Leiden printers with whom he had begun to work during his student days in the Netherlands. Maire had printed two medical works edited by Conring: Berengarius, *De fractura cranii* (Lugduni Batavorum: Maire, 1629), and Billichius, *Observationes et paradoxa chemica* (Lugduni Batavorum: J. Maire, 1631). He also printed Conring's edition of Jacob Lampadius, *De constitutione imperii Romano-Germanica* (Lugduni Batavorum: Maire, 1634), and reprinted it in 1642 as *De republica Romano-Germanica* (Lugduni Batavorum: Ex officina J. Maire, 1642). Conring published a second edition with Rixner in Helmstedt in 1640 (Helmaestadi: Rixner, 1640). As it happens, the third edition of Lampadius's work was not only published in the same year as the *New Discourse*, but is also the last known association between Maire and Conring. That may be no coincidence.

40 Actually, we do not even know that, we merely believe it. It is conceivable (and I thank Mordechai Feingold for having conceived it in private conversation) that Conring himself launched the *New Discourse* as a means of testing how his ideas would be received, and then deliberately feigned disapproval in order to keep his role secret. There is no evidence to substantiate that possibility—but then that is precisely what one would expect if Conring wanted to keep it secret. Hence the possibility cannot be dismissed. But it seems unlikely, given Conring's reaction, not only in the published preface to the *De Germanorum imperio Romano*, but also in his letter to Chancellor Schwartzkopf of November 1642 (above, n. 4), and the changes he made in the text of the *Exercitatio de imperatore Romano Germanico* when he republished it in 1674 (below, p. 411).

41 He could not respond immediately: 1643 was a busy year. First he had to finish two of his most important writings, the *De sanguinis generatione et motu naturali opus novum* and the *De origine iuris Germanici commentarius historicus*, both of which were published in

teaching in order to devote attention to a subject that now threatened to attract unwanted attention and was not unlikely to embroil him in more of the kind of contentious debates that characterized his entire career.[42] He wanted to preserve the peace and quiet of his academic life, and he would probably have been not a little upset had he been able to foretell how often that peace and quiet were going to be disturbed in the future.

Public expressions of unhappiness, however, must be taken with a pinch of salt. Ever since meeting with Jacob Lampadius in 1632 Conring had been at least as deeply interested in the history and constitution of the empire as in medicine. Since about 1634 he had regularly acted on that interest by teaching a private lecture course on the subject.[43] It was not only that the publication of the *New Discourse* could not be left unanswered. It also gave Conring an occasion, perhaps a little sooner than he had wished, to publish a systematic and detailed account of his ideas about a subject that had been close to his heart all along. That led to the next step in the publishing history of the *New Discourse*.

3 The Rebuttal of 1644

In the first days of 1644, no more than about half a year after a copy of the *New Discourse* had first fallen into his hands, Hermann Conring published his *De Germanorum imperio Romano liber unus* or *One Book on the Roman Empire of the Germans*.[44] The subject was exactly the same as that of the *New Discourse*, but the book was so much more impressive that it has with good reason been described as Conring's chef-d'oeuvre on the constitution {201 | 202} of

1643, before he was able to respond to the *New Discourse*; cf. E. Moeller, *Hermann Conring*, 75–6.

42 In his dedicatory letter to Duke August he announced: "Verum dum aliorum operam circumspicio et desidero, ipsemet ego, nescio qui, adigor invitus ad suscipiendum laborem illum, ut a vitae genere ita ab animo alienum. Neque enim declinare licuit hoc negotium, neque non invitus potui id agere, quod ab artis medicae studiis, quibus me et vitae ratio et munus academicum adstringit, toto pene, quod aiunt, coelo remotum est." *Opera*, 1:26. In his letter to the reader he wrote similarly: "Artis enim medicae negotiis occupato mihi parum profecto superest temporis adeo diversa, ut curem. . . . Caeterum ex sententia vivere non licuit mihi hoc tempore et otio tantum medico frui per iniuriam insignem, quae tamen nescio vel quo auctore vel ubi illata sit." *Opera*, 1:27.

43 E. Moeller, *Hermann Conring*, 64–5; Kundert, "Conring als Professor," 403.

44 The full title is *De Germanorum imperio Romano liber unus. Accessit Francisci Guicciardini discursus de origine secularis potestatis in Romana ecclesia*. Cf. Kelly and Stolleis, "Gedruckte Werke," 543, nr. 66.

Germany.[45] At thirteen chapters on 138 pages, it was not only more than three times as long, but also more clearly structured and argued. It dealt with the same questions, but in a more elaborate mixture of chronological progression with systematic analysis. It contained more abstract reasoning and more explicit statements of underlying philosophical principles, sometimes taking the form of excursions from the historical line to which the *New Discourse* had for the most part stayed close. It offered more detail and more quotations from primary and secondary sources, as well as two prefatory letters with information about the circumstances under which it was written, and an appendix with excerpts from the writings of Pierre Pithou (1539–96) and Francesco Guicciardini (1483–1540) that helped to substantiate attacks on papal government.[46]

Above all else, however, the *De Germanorum imperio Romano* appears to arrive at an altogether different conclusion from the *Exercitatio* of 1641 and, consequently, the *New Discourse* of 1642. The *Exercitatio* ended by declaring that the Roman Empire had either ceased to exist or been reduced to a mere shadow of its former self. As far as the *Exercitatio* and the *New Discourse* were concerned, the Roman Empire was gone and a "German empire" had risen in its place.[47] The *De Germanorum imperio Romano*, on the other hand, insisted that the Roman Empire was not gone at all. The very title of the work distinguished carefully between "Germans" and the "Roman Empire," implying not

45 Thus Herberger and Stolleis, *Hermann Conring* (1981), 47. Conring himself referred to it with a certain degree of understatement as a "liber mole quidem exiguus, at argumenti neutiquam proletarius" and even a mere "libellus" in *Opera*, 1:26, 27. Apart from the dated and superficial analysis offered by Knoll, *Conring als Historiker*, 46–92, the *De Germanorum imperio Romano* has received little scholarly attention. See, for example, E. Moeller, *Hermann Conring*, 94–9; E. Wolf, "Hermann Conring," 238–41, and Mazzacane, "Conring, Baronio," 269–70. Lang, *Staat und Souveränität*, whom one might have expected to treat it in detail, excluded it from consideration altogether—a casualty of the conceptual limits enforced by certain types of legal history. Seifert's chapter on "Conring und die 'Ottonische Legende'" in Seifert, *Rückzug der Prophetie*, 165–86, is by far the most interesting and thoughtful treatment to date.

46 The first prefatory letter was a letter of dedication to Duke August of Brunswick-Wolfenbüttel dated 23 December 1643; *Opera*, 1:26–7. The second was the *Benevolo lectori* in which Conring complained about the publication of the *New Discourse; Opera*, 1:27. The material in the appendix, *Opera*, 1:108–13, was copied from Goldast, *Monarchia* (1611–14), 3:17–21.

47 "Imperium Germanicum" is the phrase used in the first sentence of the *New Discourse*. The remainder of the text, however, speaks exclusively of "Germania" or "Regnum Germanicum." "Imperium Germanicum" had also appeared in the title of Conring, *Exercitatio de Germanici imperii civibus* (1641).

only that there was no such thing as a "German empire," but also announcing that the Roman Empire was very much alive and well—or at least alive and well enough to be held by Germans.[48] {202 | 203}

The same point of view was confirmed in what looked like unmistakable language in the final chapter of the *De Germanorum imperio Romano*. The heading of that chapter announced that "the empire over the city of Rome and the rights attached thereto still belong to Germany, even though the pope has torn them to pieces every which way."[49] The conclusion culminated in a ringing endorsement of the right of German kings to rule over the Roman Empire that was, for good measure, combined with an angry indictment of the papacy's usurpation of imperial rights.[50] That seems about as far removed from the conclusion of the *Exercitatio* as can be imagined. It also seems to make the *De Germanorum imperio Romano* an authentic statement of Conring's ideas.

On closer inspection, however, appearances turn out to be deceptive. 'Roman Empire,' as Conring explained in the body of the *De Germanorum imperio Romano*, had a double meaning. It could be taken to mean a "vast commonwealth" that went far beyond the city of Rome. It could also be taken to mean rule over the city of Rome alone. In the former sense, it was defunct.

48 Conring maintained the same point of view throughout the text by speaking consistently about Germany (*Germania*) on the one hand and the Roman Empire (*imperium Romanum*) on the other, but never simply of a "German empire." He returned to the usage "German empire" about ten years later in the *De finibus imperii Germanici* (1654), again in *De pace perpetua inter imperii Germanici ordines religione dissidentes servanda* (1657), and above all the *Exercitationes academicae de republica imperii Germanici* (1674). The "Roman-German" combination reappeared in the *Dissertatio de comitiis imperii Romano-Germanici* (1666) and the revised edition of Lampadius, *De republica Romano-Germanica* (1671). The inconsistent terminology clearly reflects the difficulty Conring confronted in bringing the concept of the sovereign state to bear on the reality of the Holy Roman Empire. On the history of the official title of the empire in general see the excellent article by Weisert, "Reichstitel bis 1806," with further references.

49 "Imperii urbis Romae et eorum, quae inde pendent iura, etsi a papa omnibus modis sint convulsa, etiamnum tamen ad Germaniam pertinere." *Opera*, 1:99.

50 "Cum nullo igitur iure excusserint papae caesaream vim a sese ac urbe Roma, manifestum est iura illa caesarum, quibus ad Hildebrandi usque aevum fuerunt usi, utut adversum illa arietaverint pontifices, hodieque integra subsistere. Finiam hanc disputationem verbis quae feruntur Cyni Pistoriensis nobilissimi iurisconsulti: *pastores ecclesiae in lupos rapaces sunt conversi, insatiabiles rerum temporalium et ambitione dominandi. Diversis viis illicitis nisi sunt et nituntur imperium et imperialia usurpare. Ideo sub eorum gubernatione totus mundus positus est in maligno, et sub regimine tyrannorum. Sed sicut puto, eorum divina vindicta proxima est. Et utinam esset proximior!" Opera*, 1:107; Conring's italics. Note that on this occasion Conring calls his book a disputation. So far I have not been able to verify the source of the quotation attributed to Cino da Pistoia.

Only in the latter sense could it be said to have endured to the present.[51] On those points there was no difference between the *Exercitatio* of 1641 and the *De* {203 | 204} *Germanorum imperio Romano* at all. Both maintained that the Roman Empire in the sense of a "vast commonwealth" was gone, and that whatever was left of it was now limited to rule over the city of Rome. Both also maintained that rule over the city of Rome was now in the hands of the papacy.

The difference between the *Exercitatio* of 1641 and the *De Germanorum imperio Romano* thus turns out to be limited to two points. First, the *Exercitatio* of 1641 entertained the possibility that the papacy's control over the city of Rome had become legitimate; the *De Germanorum imperio Romano* insisted that it had not. This difference turned on the purely technical legal question whether or not prescription (the Roman legal tool by which undisputed possession over a long period of time is transformed into legitimate ownership) applied to the papacy's control over Rome. It was also small: for though the *Exercitatio* of 1641 did grant the possibility that prescription had worked in the papacy's favor, it did so only because it considered the point too unimportant to argue. Second, according to the *Exercitatio* of 1641 German kings seeking to reassert control over a 'Roman Empire' narrowly defined as rule over the city of Rome were wasting their time; according to the *De Germanorum imperio Romano* they were not wasting any time at all. That difference was more significant, but it was merely a matter of emphasis and judgment. It helped to deflect the anger of Protestant princes who might have been upset over the carelessness with which the *Exercitatio* of 1641 surrendered Rome to the papacy, and that of a king of Germany who insisted on being treated as emperor of Rome. It reflects, not a change of mind, but Conring's concern for his own safety and reputation.[52]

In truth, the *De Germanorum imperio Romano* of 1644 thus turns out to reach essentially the same conclusion as the *Exercitatio* of 1641. Indeed, even the formal difference between the mere 'exercise' of 1641 and the authoritative 'book' of 1644 is not what it at first sight seems to be. For the *De Germanorum imperio Romano* of 1644, too, was first presented to the public as a dissertation defended in a public academic examination by one of Conring's students.

51 "Igitur si imperii Romani voce intelligas vastam aliquam rempublicam, cuius iura ad urbem illam pertineant, ut factum olim, dudum desiit Romanum imperium omne. Si vero ad nominis illius maiestatem tuendam sufficit unius urbis regimen, durat Romanum imperium hodieque." *Opera*, 1:89. Conring was by no means the first to insist on this distinction. For a celebrated and much earlier use of precisely the same distinction, see Marsiglio of Padua's *De translatione imperii* 1, in Marsiglio, *Writings on the Empire*, 66.

52 The issues raised in this paragraph are too complicated to be considered here in full.

The dissertation was entitled *De imperio Romano Germanorum disputatio* (note the slightly different title), the student was Johann Christian von Boineburg, and the defense took place on two separate occasions in December 1643, only a few days before the *De Germanorum imperio Romano* officially appeared in print.[53] All that remains is the announcement {204 | 205} of Boineburg's first disputation for 6 December 1643, accompanied by three corollaries. No announcement of the second disputation has been preserved (if one was ever printed), nor is there any separately printed version of the text that Boineburg defended. But that does not mean that the text of his disputation has been lost. Conring's own *De Germanorum imperio Romano* was published in the very first days of 1644 at the latest, and in it Conring himself stated as clearly as could be desired that Boineburg had defended it "in the academic fashion" on two separate occasions.[54] Thus Boineburg's disputation was almost certainly based on galleys or an advance copy of the *De Germanorum imperio Romano* itself.[55]

The publication of the *De Germanorum imperio Romano* thus furnishes an interesting point of comparison with von Hoym's *Exercitatio* of 1641. On the one hand, unlike von Hoym's *Exercitatio*, the *De Germanorum imperio Romano* was acknowledged by Conring to have been written by himself and published

53 The full title reads: *De imperio Romano Germanorum disputatio prima, quam sub praesidio Hermanni Conringii, philosophiae ac medicinae doctoris huiusque professoris publici, publice examinandum proponit Ioan Christian a Boineburg ad VI. Decembris* (HelmaestadI: Typis Henningi Mulleri Acad. typ., 1643). See also Kelly and Stolleis, "Gedruckte Werke," 542, nr. 64. On Boineburg see Ultsch, *Johann Christian von Boineburg*, Saring, "Boineburg," and now especially Peterse, "Johann Christian von Boineburg."

54 "More academico bis pro hisce defendendis respondit Ioannes Christianus a Boinenburg." Conring, *De Germanorum imperio Romano* (1644), sig.):(3^{v}. Goebel omitted that statement from its proper location, immediately following the prefatory letters, in his reprint of the *De Germanorum imperio Romano* in *Opera*, 1:27, but did repeat it in his own description of the circumstances surrounding its publication, ibid., 1:vii.

55 The official date of publication is slightly misleading. The printed dedicatory letter to Duke August, *Opera*, 1:27, was dated as early as 23 December 1643, and only two weeks later, on 8 January 1644, Conring sent a printed presentation copy to Duke August. That copy is preserved in the Herzog August Bibliothek in Wolfenbüttel with the call number "36.4 Politica," and Conring's accompanying letter to the duke is glued to the back of the front cover. In spite of the official date of publication, the book may well have been printed before the year 1643 had ended. Goebel, *Opera*, 1:vii, actually does date the publication of the *De Germanorum imperio Romano* to 1643, but probably only because he never saw the title page of the first edition, the only place from which he could have known the original date of publication. He reprinted the second edition of 1694, which makes no reference to the original date of publication, but does contain Conring's dedicatory letter to the Duke of December 1643.

under his own name. It did not simply consist of notes taken from his lectures and the student who defended it, though among Conring's most distinguished, does not appear to have had any hand in its composition. On the other hand, like von Hoym's *Exercitatio*, the text of the *De Germanorum imperio Romano* was first presented to the public in an academic disputation at the University of Helmstedt by one of the students under Conring's supervision.

This was no mere formality. Conring himself made sure to inform his readers that Boineburg had defended the *De Germanorum imperio Romano* in an academic disputation.[56] On at least one occasion, in the conclusion, he actually referred to the *De Germanorum imperio Romano* as a {205 | 206} "disputation."[57] Moreover, even if Conring did not compose the *De Germanorum imperio Romano* by drawing directly on his own lecture notes, their content must surely have been thoroughly present in his mind. He had been giving courses on the Holy Roman Empire for close to ten years. Lacking transcripts of his lectures, we shall never know just how closely the text of the *De Germanorum imperio Romano* resembles the words Conring delivered in class. Given the speed with which the *De Germanorum imperio Romano* was written, the resemblance may well have been great.

The distinction between the *Exercitatio de imperatore Romano Germanico* and the *De Germanorum imperio Romano* thus is not nearly as sharp in reality as Conring wanted his readers to believe. In a purely formal sense, they belonged to the same genre. Both were first presented to the public in academic examinations in which they were defended by his students; both reproduce material that he had first presented in his lectures; both received his approval, though different forms of it; and neither may be assumed to represent exactly what he told his students.

The same conclusion follows if we look more closely at the contents of the *De Germanorum imperio Romano*. Never mind the length, arrangement, and external appearance of the *De Germanorum imperio Romano*; these are indeed quite different. But the case is fundamentally the same: it begins with the same questions; it uses the same means to answer them; it proceeds in the same fashion from the fall of Rome via Charlemagne and Otto the Great to (more or less) the present; it gives the same (novel) significance to the coronation of Charlemagne on Christmas 800; and it dwells at the same length and with the same grave emphasis on the reign of Otto the Great. In short, both works

56 Above, n. 54.

57 Above, n. 50.

embraced the same fundamental perspective on the demise of the Roman Empire.[58]

Indeed, the resemblance between the *Exercitatio* of 1641, the *New Discourse* of 1642, and the *De Germanorum imperio Romano* of 1644 is so close that the former are perfectly well suited to convey the ideas restated in the latter. Conring himself thought so and even said so many years later, when the risks he might have feared in 1643 were no longer present and without, of course, pointing out that the *New Discourse* contained precisely the same text as the *Exercitatio*. He did so in lectures on the Holy Roman Empire that were never published until Goebel included them in his edition of the *Opera*. There Conring stated flatly that the *Exercitatio* of 1641 could be {206 | 207} used as a "compendium" of the *De Germanorum imperio Romano* and positively encouraged his students to rely on the *Exercitatio* if they had any trouble locating a copy of the *De Germanorum imperio Romano*.[59] That clinches the case. It is surprising only if one believes that Conring's rejection of the *New Discourse* was founded on his disagreement with the doctrines it contained. It is not at all surprising if one recognizes that the *New Discourse* is substantially identical to the *Exercitatio* of 1641, and that both of them make the same case in brief as the *De Germanorum imperio Romano* makes at length.[60]

The differences between the *Exercitatio de imperatore Romano Germanico* of 1641, the *New Discourse* of 1642, and the *De Germanorum imperio Romano* of 1644 are thus not at all well described by declaring that Conring was the author only of the latter (because he wrote it 'himself') but not of the former (because one was 'written' by a student, and the other an unlicensed reprint). Much less is it permissible to take at face value Conring's castigation of the *Exercitatio de imperatore Romano Germanico* of 1641, his outright rejection of the *New Discourse* of 1642, or his characterization of the *De Germanorum imperio*

58 See, for example, the opening passages of the two works, where their rationales are established in virtually identical fashion; or compare *De Germanorum imperio Romano* 2.1 with *New Discourse* 4–5, where the same textual references are invoked; *De Germanorum imperio Romano* 3.9 with *New Discourse* 12; and *De Germanorum imperio Romano* 3.14 with *New Discourse* 9.

59 "Caeterum tempore Ottonis Magni, qui praeterpropter 100 annis vixit post Carolum Magnum, ipsius felicitate regnum Germaniae, quod tum regnum Francorum dictum, alterno foedere iungebatur regno Italiae et imperio Romano, quod ostensum a me in libro de imperio Romano Germanico. Quibus liber iste non est in manibus, legant disputationem meam de imperio Germanico, quae quasi est compendium eius rei." *Opera*, 2:239.

60 Knoll, *Conring als Historiker*, 24, arrived at a similar conclusion. Knoll's analysis, however, leaves much to be desired and is entirely uninformed about the differences between the conclusions of the *Exercitatio* and the *De Germanorum imperio Romano* that were considered above.

Romano as a rebuttal of the two former works. In truth, all three works reflect different shades of Conring's thinking, and the *De Germanorum imperio Romano* cannot be trusted to offer his point of view with any greater degree of authenticity than do the *Exercitatio de imperatore Romano Germanico* or the *New Discourse*. Indeed, to the extent that it was written to forestall attacks on Conring's person, it must be judged to be a shade less authentic.

Over the years Conring repeatedly announced his intention to prepare a second edition of the *De Germanorum imperio Romano*.[61] He also compiled a number of notes that were meant for inclusion in the second edition.[62] Yet he died in 1681 without ever having managed to complete the task. It was {207 | 208} left to his son, Hermann Conring junior, to publish a second edition with the notes that Conring had collected before his death.[63]

The main differences between the first and the second edition of the *De Germanorum imperio Romano* are easily described. First, Conring junior subdivided each of the thirteen long chapters of the *De Germanorum imperio Romano* into short paragraphs, which made it easier to refer to the text with precision. Second, he added a two-page index of the sources on which Conring senior had relied, as well as a somewhat more detailed subject index.[64] Third, he inserted a "New Letter to the Reader" in which Conring senior explained with some contrition why he had attributed the short statement about the temporal power of the pope in the appendix to Pierre Pithou.[65] Fourth, and finally, he incorporated Conring senior's notes into the body of the text.[66] Most

61 See Goebel's remarks on nr. 2 in his preface to the first volume of *Opera*, 1:sig.):():(r.

62 It seems likely that at least some of those notes were made during Conring's re-reading of the *Exercitatio de imperatore Romano Germanico* of 1641 in preparation for its republication in the *Exercitationes academicae* of 1674, on which see below, pp. 409–11.

63 Conring, *De Germanorum imperio Romano* (1694); see Kelly and Stolleis, "Gedruckte Werke," 543, nr. 66b. This is the edition that Goebel reproduced in *Opera*, 1:26–107. Note that Kelly and Stolleis, "Gedruckte Werke," 542 nrs. 64, 64a; 543 nrs. 66, 66a; and 550 nrs. 135, 135a, confuse the *De Germanorum imperio Romano* of 1644 with Boineburg's dissertation of 1643 and the hybrid edition in the *Acroamata sex* of 1655 to be discussed below, pp. 407–9.

64 "Index autorum et monumentorum," in Conring, *De Germanorum imperio Romano* (1694), 195–6 (actually 165–6), reprinted by Goebel in *Opera*, 1:113–14. The "Index rerum" consists of five unpaginated leaves at the end of the book. Goebel did not reprint that index, presumably because he compiled his own subject index to all of Conring's works in volume 7 of the *Opera*.

65 He had relied on his source, Goldast, *Monarchia Romani Imperii*, but Goldast was apparently mistaken; cf. *Opera*, 1:107–8.

66 He did not identify these notes explicitly. He did usually introduce them with a signal to the reader that he would now refer to another reference (*vide*) or add (*additur*) another

of these additions consist of minor reformulations and new or expanded references to the literature. On a few occasions they extend to whole paragraphs and include new thoughts and arguments.[67] But only very rarely do they suggest that Conring had changed his mind about this or that matter.[68] {208 | 209}

4 The Unauthorized Hybrid of 1655

In 1655 an anonymous "society" of printers in Embrun republished the *New Discourse* in yet another pirated edition, as part of a volume entitled *De Imperii Germanici republica acroamata sex historico-politica or Six Historico-Political Lectures on the Commonwealth of the German Empire*.[69] The *Acroamata sex* were a compilation of every dissertation on the constitution of the German empire that had been written under Conring's supervision since 1641. In addition to von Hoym's dissertation on the emperor, it included six others dealing with, respectively, the imperial estates, the electors, the bishops, the princes, the cities, and the courts.[70] The *Acroamata sex* thus constituted something like a compendium on the constitution of the Holy Roman Empire.

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passage, but their extent cannot be reliably identified unless the text of the second edition of 1694 is compared line by line with the first edition of 1644.

67 Thus for example *De Germanorum imperio Romano* 9.5 (1694), 67, which mentions in passing a question about the nature of Charlemagne's empire; 10.22 (1694), 91, commenting briefly on a statement of Georg Calixt on the Western church; and 13.26 (1694), 143–4, which contains a number of references designed to substantiate the point that the kings of Germany never acquiesced in the usurpation of imperial rights that Conring believed the papacy to have been guilty of practicing since the times of Pope Gregory VII.

68 The most interesting instance of what looks like such a change of mind concerns the interpretation of the Apocalypse of John. In 1644 Conring had accepted the Apocalypse without comment as evidence that the Roman Empire would last forever, just so long as 'Roman Empire' was taken to refer to the empire usurped by the Roman church. In an addition published in 1694, however, he declared, "credibile tamen est, tandem aliquando, et quidem satis forte diu ante extremum diem, urbem et imperium hoc ruiturum." *Opera*, 1:89–90. ("It is, however, likely that this city and empire, too, will eventually come to ruin, and even long before the last day [of the world]." My translation.)

69 1655 is printed on the title page. The frontispiece preceding the title page has 1654. See Kelly and Stolleis, "Gedruckte Werke," 550, nr. 134.

70 They were presented in the chronological order in which they had been published: (1) on pages 1–23: *Exercitatio de Germanici imperii civibus* (1641), dealing not with "citizens," but with the estates in the imperial diet; (2) 25–76: *Exercitatio de urbibus Germanicis* (1641); (3) 77–96: *Exercitatio de ducibus et comitibus imperii Germanici* (1643); (4) 97–120: *Dissertatio de septemviris seu electoribus Germanorum regni et imperii Romani* (1644); (5) 121–96: *De constitutione episcoporum Germaniae* (1647); and (6) 197–274: *Exercitatio de*

The *New Discourse* occupied a special place in that compendium. It was not counted among the six *acroamata* but singled out at the end as a seventh, separate little treatise.[71] It was endowed with new and improved titles: *Tractatus de imperatore Romano Germanico* on the title page, and *De Imperatore Romano Germanico discursus historico-politicus* or *Historico-Political Discourse on the Roman German Emperor* in the body of the text. Most important, the text was altered. The beginning and end were copied directly from the *New Discourse*, but a substantial section in the middle was stolen from the *De Germanorum imperio Romano*.[72] The *De Imperatore Romano Germanico discursus historico-politicus* of 1655 is thus an entirely unreliable hybrid, corresponding to no single work ever written by Conring or any of his students. {209 | 210}

The reasons why the *New Discourse* was published in yet another unauthorized version are not difficult to imagine. In the aftermath of the Peace of Westphalia of 1648, there was a certain demand for lucid accounts of the Holy Roman Empire's constitutional structure. The *De Germanorum imperio Romano* of 1644 was lucid, but it suffered a serious disadvantage: it was too long. If we can trust the information at Conring's disposal, the *Acroamata sex* were precisely the success that their publishers must have hoped them to be: they circulated in France, Italy, Spain, and England.[73] They forced Conring to recognize that his dissertations on the constitution of the Roman Empire, including the *New Discourse*, had taken on an irrepressible life of their own. Even while he continued to insist that it was wrong to regard his students' dissertations as his own works properly speaking, he did acknowledge that the public relied on them for effective introductions to his understanding of

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iudiciis reipublicae Germanicae (1647). The printers of the *Acroamata sex*, like those of the *New Discourse*, omitted words like *exercitatio* and *dissertatio* along with references to respondents from the titles, presumably for similar reasons.

71 Conring, *Acroamata sex*, 275–309.

72 The beginning of the *Acroamata sex*, 275–6, up to the words "sive iure," is taken from *New Discourse* 1–4 and the first sentence of chapter 5; the following section, *Acroamata sex*, 276–89, from the words "totum enim terrarum orbem" to the words "saepius iam memorata," is taken from the first edition of *De Germanorum imperio Romano* 2–5 (1644), and replaces chapters 6–23 of the *New Discourse*; the rest, *Acroamata sex*, 289–309, starting with the words "hec vero cum ita se habeant," is taken from *New Discourse* 24–56. The text is not exactly identical to that of either one of its sources. The printers removed the chapter numbering and made other minor changes. Also of course it includes none of the additions to the second edition of the *De Germanorum imperio Romano* (1694).

73 "Qui liber [i.e., the *De Imperii Germanici republica acroamata sex*] cum in Galliam, Italiam imo, et Hispaniam ac Britanniam penetraverit, passim ipsimet orbi persuasum est iamdudum mihi auctori isthaec omnia deberi." Conring, *Exercitationes academicae* (1674), sig.):():(1^{v}.

the empire. There were good reasons why they had come to be regarded as if they had been written by himself and why they had acquired a reputation for containing valuable information not to be found anywhere else. Under those circumstances, it was neither right nor possible for him to continue to refuse to take a hand in their circulation, if only in order to prevent any further misrepresentations.[74] {210 | 211}

5 The Authorized Revision of 1674

Those were the reasons that prompted him in 1674 to set the record straight. He collected all of the dissertations on the constitution of the Holy Roman Empire that he had supervised, arranged them in the chronological order in which they had been written, and published them in a single volume entitled *Exercitationes academicae de republica imperii Germanici*. There were now ten such dissertations. Seven had already been available to the editors of the *Acroamata sex* in 1655 (not counting Boineburg's *De imperio Romano Germanorum*). In the 1660s Conring had once again become interested in the German constitution and had directed two dissertations about the imperial diet in 1666 and one about the "officials" of the empire, which is to say, the

74 His reasoning bears full quotation: "Caeterum, quia hae exercitationes non in totum sunt meae, passus sum eas hactenus vagari earumque singulas huc illuc spargi, omni quasi cura illarum seposita, iam tum praesertim circa vere propria satis occupatus. Ast nunc mutare istum animum non una de causa sum coactus. Observavi videlicet libellos istos disputationum sine discrimine omnes a quammultis praeclare doctis viris passim, non in Germania duntaxat nostra sed etiam alibi, mihi uni acceptos referri, idque non dissimulari etiam editis scriptis. . . . Accedit quod benignis praestantium virorum iudiciis ac praeconiis persuasum sit in ipsum vulgus, contineri hisce exercitationibus multa utilia, quae ab alio tamen nemine sint dicta ac proinde alibi nusquam invenire sit; ex quo illarum lectio passim desideratur, ipsis tamen raro comparentibus. Haec sane aliaque nonnulla ad curas secundas horum libellorum me quamvis neutiquam otio abundantem tandem revocaverunt. Nec vero fas fuit visum eorum abiicere omnem prope amorem, quorum pars saltim maxima reapse mihi debebatur, multo minus, postquam hominum quasi communi consensu, etsi erroneo, in unius mei nomen sunt pridem adoptata. Cumque iniuria non levis et bono publico et singulatim mihi hactenus fuerit illata, cum perquam mendosis editionibus tum mutationibus inconsultis, saltim imposterum illam avertere, (quia quod factum est nequit infectum reddi) etiam officii mei et existimationis tuendae esse iudicavi." Conring, *Exercitationes academicae* (1674), sig.):():(1r–2r.

prince electors, in 1669.[75] These were now added to the group that was included in the *Acroamata sex*.

At first Conring had planned merely to republish his dissertations as a collection without spending any additional effort on them. But as he reread them, he decided that he needed to make changes and additions.[76] For the most part he limited himself to changing imprecise formulations, adding cautionary clauses, and correcting outright errors. It deserves to be especially noted that he did not consider it necessary to check the accuracy of every detail. The *Exercitationes academicae* remain full of misprinted dates and garbled references that were copied directly from the originals. But although Conring's changes were limited in scope, they sometimes touched on important points of substance. One dissertation, moreover, dealing with the bishops of the Holy Roman Empire, was far more thoroughly revised than the rest. It addressed a subject that Conring considered to be both especially important and poorly understood.[77] Finally, Conring wrote a substantial preface to explain to his readers exactly how these dissertations had come into existence and how closely they represented his own views. {211 | 212}

The result was a compendium similar in conception to the unauthorized *Acroamata sex* of 1655, but different in three ways: it was now authorized by Conring himself; it added three new dissertations; and it not only included all of the details necessary to inform readers about the academic origin of each of the dissertations in question, but also improved upon the text of the originals. The *Exercitationes academicae* of 1674 were more than a reprint; they were a revised, improved, and authorized edition.

This applies to the *Exercitatio de imperatore Romano Germanico* of 1641 as well. Most of the changes that Conring made are minor. There are the usual differences in typography, orthography, and punctuation. There are the equally

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75 Conring, *Dissertatio de comitiis imperii Romano-Germanici* (1666); Conring, *Dissertatio de praecipuis negotiis in comitiis imperii Germanici* (1666); Conring, *Dissertatio de officialibus imperii Romano-Germanici* (1669).

76 "Et sane initio quidem unum hoc consilium fuit, omnia non nisi in pristinam integritatem restituta edere, uno volumine comprehensa. Dum post longum autem temporis intervallum relego cuncta, statim observavi quamplura correctione indigere, alicubi et augmentum aliquod esse necessarium. Eoque in recensione utrumque deinceps etiam egi. Mutavi, inquam, tantum non infinities si quae visa fuerunt minus commodis verbis dicta (ab assertionibus enim ipsis primis vix semel iterumque discessi) etiam interpolando varia passim et frequenter addidi, ita tamen, ut ad plenam tractationem argumenti cuiuslibet multa adhuc deesse neutiquam velim diffiteri." *Exercitationes academicae* (1674), sig.):():(2^{r-v}.

77 See his remarks in *Exercitationes academicae* (1674), sig.):():(2^{v}–3^{v}.

usual erratic corrections of misprints and the appearance of new misprints. There are also a few points where Conring decided to rephrase a sentence in order to straighten out the grammar or add conceptual precision.

There is one point, however, where Conring went beyond making merely cosmetic changes; that point came at the conclusion. The *Exercitatio de imperatore Romano Germanico* of 1641 and the *New Discourse* of 1642 both concluded that the Roman Empire had either ceased to exist or been reduced to a tiny piece of land and a worthless title now held by the papacy. In the revised version of 1674, however, the key sentence of the conclusion included a parenthetical addition that changed the point of the original conclusion into its opposite:

> If after so many years of prescription our kings and emperors have lost all those true and ancient rights of the emperors (which cannot be admitted by any means), then there is no longer any reason . . . .[78]

In the original version Conring concluded that the German "kings and emperors had lost all those true and ancient rights of the emperors." In the revised version he concluded that no such loss could be admitted.

This change did not fit altogether smoothly into the logic of the original text: it became difficult to understand, for example, why the text still went on to affirm that the emperor should not continue to claim lordship over the city of Rome or try to secure his coronation in Rome. Why not do just those things if it could not be admitted that he had lost his rights in Rome? But the new version of the *Exercitatio de imperatore Romano Germanico* also brought the conclusion into line with that of the *De Germanorum imperio Romano*. {212 | 213}

6 The Canonical Edition of 1730

In 1730 Johann Wilhelm Goebel reprinted the *Exercitatio de imperatore Romano Germanico* in his six-volume edition of Conring's legal, historical, and political works in Brunswick. Not surprisingly, he chose to reproduce the revised version of the *Exercitatio* that Conring had published in 1674.[79] In this fashion he

78 "Id certum *haud forte iniuria* videtur, si tot annorum praescriptione perierint nostris regibus et caesaribus omnia vera illa et antiqua caesarum iura (*quod tamen neutiquam admitti potest*), non esse amplius, cur vane iactent . . . ." Conring, *Opera*, 1:541. The words in italics were first added in the version of 1674.

79 *Opera*, 1:528–42. Goebel also added a considerable number of footnotes with information about points of detail and references to relevant writings by Conring and other authors.

unwittingly helped Conring to conceal the differences between the original *Exercitatio* of 1641 and the *De Germanorum imperio Romano* of 1644 that seem to have bothered him the most. By the same token he confirmed the impression that Conring had never swerved from insisting on the ancient rights that German kings were entitled to exercise over the Roman Empire and against the papacy—and never mind that the Roman Empire had shrunk to the limits of the municipal government of Rome. Thus he helped Conring to lead at least one historian who never looked at the original dissertation to believe that the *Exercitatio de imperatore Romano Germanico* of 1641 and the *De Germanorum imperio Romano* of 1644 differed in no important way at all.[80]

The history of the *New Discourse* thus ends on an ironic note. The text that Conring approved in the *Exercitatio* of 1641 and that was reprinted in the *New Discourse* of 1642 became the least likely to be read, and the most likely to be rejected as spurious. The version most likely to be accepted as genuine (because sanctioned by Conring in 1674) and most likely to be read (because reprinted in the *Opera*) departed from the original in an important way. The canonical edition of Conring's works thus helps to conceal a conclusion that he is more than likely to have contemplated seriously in 1641, and from which he only seemed to have dissociated himself in 1644 because its premature publication forced his hand.

In the end Conring thus gained a qualified victory in his battle to banish the *New Discourse* from recognition. It was no longer understood that he rejected the *New Discourse* mostly because of the form in which it had been published; it was forgotten that the *De Imperatore Romano Germanico discursus historico-politicus* printed in the *Acroamata sex* of 1655 was an unreliable hybrid; and no one noticed that Goebel's reprint of Conring's revision of the *Exercitatio* differed from the original in at least one noteworthy respect: it obscured the willingness with which, at a relatively early and unguarded moment in his career, Conring had consigned the Roman Empire to the past. {213 | 214}

7 Conclusion

> Of persons artificial, some have their words and actions *owned* by those whom they represent. And then the person is the *actor*, and he that owneth his words and actions is the Author, in which case the actor acteth by authority. For that which in speaking of goods and possessions

80 That historian was Knoll, *Conring als Historiker*, 24.

> is called an *owner* (and in Latin *dominus*, in Greek *kurios*), speaking of actions is called author.

That is how Thomas Hobbes defined an author, a few years after the *New Discourse* was printed, in words that penetrated straight to the early modern heart of the matter.[81] If we may follow where Hobbes leads, the upshot of this complicated story for our concepts of authorship and authenticity can be simply stated: 'author' is a concept whose meaning is inseparably linked to ownership, agency, and representation. It belongs in the sphere of law. It is useful for settling disputes over the extent to which people 'own' their writings, but not so useful for understanding where ideas come from.

When Goebel pointed out that Conring did not acknowledge the *New Discourse* as "his own," he was therefore describing the relationship between Conring and the *New Discourse* well in terms of law. In those terms it was entirely appropriate that he went on to mention Conring's heirs. For neither Conring nor his heirs professed to 'own' the *New Discourse*. Hence they could not be held responsible for its contents or publication. But does it follow that Conring did not develop the ideas that the *New Discourse* publicized? Most definitely not. The legal relationship between 'authors' and 'their' writings is surely different from the creative relationship between people and their ideas. 'Author' is a concept too crude to capture both. Spirit is free. Code can be owned; meaning cannot.

Some of the reasons for this conclusion are, of course, entirely specific to the case examined here: that of a dissertation, based on lectures, defended by a student, pirated, improved, expanded, amalgamated, reconsidered, and reprinted in several different editions. In a case in which so many ideas appeared in so many different guises and with the indisputable participation of several different individuals in shaping the content and publication of a text, it seems evident that the creative relationship between the author and the writing is fluid, shifting, indefinable. The same may not seem nearly so evident in the case of, say, a single piece of writing, clearly different from all other writings, indisputably attributed to just one single person, and published on just one occasion in just one form, although perhaps in many different copies—the case, in other words, of what we normally believe to be a 'book.' {214 | 215}

From that perspective, the case presented here may well be judged to reflect the particular historical circumstances of the Renaissance: an age in which ideas of authorship (like those of creativity, originality, and individuality) were

81 Hobbes, *Leviathan* 1.16.4, ed. Curley, 101.

taking their modern shape, but did not yet dominate the field to the exclusion of that older point of view according to which authority was vested, not in a person, but in the truth of writings transmitted from antiquity. The 'author' was still competing with the 'authorities.' Hence the uncertainty about the author of the *New Discourse*. Perhaps more specifically still, the case may be said to reflect how difficult it was for authors to disentangle their own authority from the authority of writings in a setting as deeply rooted in medieval corporate traditions of higher learning as that of disputations held by students and professors in seventeenth-century German universities. It is at least legitimate to wonder where else, as late as the 1640s, ideas of authorship could have manifested themselves in equally ambiguous fashion.

From a broader point of view, however, the case presented here merely reflects particularly clearly how difficult it is in any time and place to specify exactly what is entailed by writing, and how far exactly we may hold writers (all writers, any writer) responsible for what they write. From that perspective the difference between a book with an undisputed author and one like the *New Discourse* is merely a difference of degree, a matter of accidents by which some writings are reproduced in different versions and some writers are compelled to retrieve their rights from pirates and usurpers, whereas others are not. The circumstances of late Renaissance Germany may well have made it more than usually difficult to tell with confidence who was responsible for thinking, saying, or doing what. But they may hardly be credited with having brought into existence a difficulty that stems from the difference between locutionary content and illocutionary act. Conring himself believed the dissertations over whose defenses he presided to have been "both mine and not mine."[82] That statement may well capture the true relationship between writers and their ideas more adequately than notions of authorship invented in order to make both writers and 'their' writings amenable to the kind of law and order demanded by society.

As far as authenticity is concerned, none of the works considered here may claim to represent Conring's meaning fully, but all may claim to represent it to a respectable degree—even the hybrid of 1655. Authentic meaning can hardly manifest itself directly in locutions whose meaning is known, indeed, intended to diverge from the very illocutionary act by which they are proposed. Yet it does manifest itself to some degree. The lesson seems to be that authenticity is not to be expected from the routine {215 | 216} deciphering of code. Authentic meaning appears with the greatest clarity when the routine breaks down, as

82 "Et meae sunt igitur exercitationes illae, et meae non sunt." Conring, *Exercitationes academicae* (1674), sig.):(():(1ʳ.

when the publication of the *New Discourse* disturbed the meaning of the *Exercitatio de imperatore Romano Germanico*. That does appear to open a clear view on the writer's mind. The routine may well break down for different reasons: the same piece of code can carry conflicting meanings; and different pieces of codes can carry the same. But some breakdown in understanding seems to be necessary for the experience of authenticity. Perhaps we must first recognize that we have failed to understand correctly in order to arrive at the belief that we can understand at all. Perhaps, at some fundamental level, misunderstanding is a prerequisite for the experience of authenticity.

CHAPTER 13

Political Unity and Religious Diversity: Hermann Conring's Confessional Writings and the Preface to Aristotle's *Politics* of 1637

Thomas Hobbes defined a person as someone

> whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.[1]

His definition distinguishes sharply between the person and the person's words or actions. Of course the words or actions can be regarded as the person's own. That would reflect our natural understanding of what a person is: a human being saying and doing certain things. But Hobbes stretches the natural understanding beyond its ordinary limits. The way he sees the matter, words and actions need not at all belong to the person saying and doing them. They can represent the words and actions of someone else. Indeed, they need not come from any human being; they can be attributed to things. Even if the attribution is grounded in a fiction, the person does not lose its reality. From Hobbes's point of view, a person is like an actor appearing on a stage in one of infinitely many forms of play.[2] The person is one thing, the role is quite another.

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1 Thomas Hobbes, *Leviathan* 1.16, ed. Macpherson, 217.

2 "The word Person is latine: instead whereof the Greeks have πρόσωπον, which signifies the *Face*, as *Persona* in latine signifies the *disguise*, or *outward appearance* of a man, counterfeited on the Stage; and sometimes more particularly that part of it, which disguiseth the face, as a Mask or Visard: And from the Stage, hath been translated to any Representer of speech and action, as well in Tribunalls, as Theaters. So that a *Person*, is the same that an *Actor* is, both on the Stage and in common Conversation." Hobbes, *Leviathan* 1.16, ed. Macpherson, 217.

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The actor wears a mask. What lies behind the mask, however, may never be revealed without undoing the very nature of the person.

Hobbes justified his definition by drawing on the meaning of πρόσωπον {319 | 320} in ancient Greek and *persona* in ancient Latin. But there was something more at stake than just classical etymology. Hobbes was reacting to the strain that two opposing forces placed on early modern Europeans: on the one hand, deep uncertainty about the nature of religious truth, and on the other, the need to identify with some form of it. The writings of men like Luther, Zwingli, and Calvin, and documents like the Augsburg Confession or the canons and decrees of the Council of Trent had never settled the question of religious truth. Each was lucid in its way, but they did not agree with one another and their interpretation was a matter of intense debate. Yet theologians, politicians, and ordinary folk all had to play their part in society. Emigration or the establishment of new communities in isolated places was taken up by some. But it was not for all, and minding your own business without disturbing others worked only so long as war did not come knocking on your door. War did come knocking, and soldiers came to ask if you were able to pronounce the shibboleth. What was your faith? Under those circumstances it made sense to heighten a distinction between the person and the person's role that is basic to the human condition, but only on occasion raised to consciousness.

In just this fashion Hermann Conring (1606–81), professor of medicine at the University of Helmstedt and soon to become professor of politics as well, stepped self-consciously on to the stage of European confessional debate early in 1648 in order to impersonate a Catholic theologian.[3] At the time negotiations for bringing the Thirty Years War to a conclusion had long been underway. But late in 1646 confessional hackles had once again been raised by the publication of a Catholic memorandum maintaining that it was impossible to make real peace with Protestants.[4] Even among Catholics that position was regarded as extreme. Conring decided to respond with a book entitled *Pro pace perpetua Protestantibus danda consultatio Catholica* or *A Catholic Recommendation to Conclude Perpetual Peace with Protestants*. He had it published under the fictitious imprint of "a long-suffering German" (*Apud Germanum Patientem*) in the fictitious town of Frideburg (actually Helmstedt), and he wrote it under the pseudonym Irenaeus Eubulus, which may perhaps be translated as "Peacelover Goodwill" without concealing the inelegance of a

3 For information about Hermann Conring's life and works, see Fasolt, *Limits of History*, and Stolleis, ed., *Hermann Conring* (1983).

4 This was the *Iudicium Theologicum* written by Heinrich Wangnereck for the bishop of Augsburg in 1640, but not published until the end of 1646; see Dickmann, *Der Westfälische Frieden*, 413–14.

name chosen for no other purpose than to leave no doubt in the reader's mind about the laudable intentions to which the author was laying claim.[5] {320 | 321}

Styling himself an Austrian theologian (*Theologus Austriacus*) Conring pretended to write from a point of view quite different from his own. He did not even hesitate to refer to Protestants as heretics in formulating the central question that Irenaeus Eubulus sought to answer:

> Is it possible for his Holy Imperial Majesty and the other estates of the Roman Empire to conclude perpetual peace with Protestants, that is, with heretics, without violating conscience?[6]

His disguise worked so well that its effect was possibly not quite what he intended. His friend Lampadius (1593–1649), a leading voice among Protestants, wrote a preface welcoming the arguments of Irenaeus Eubulus. But since he did not know the author's true identity, he also gave vent to his frustration that even moderate Catholics did not seem able to refrain from denouncing Protestants as heretics.[7]

The *Consultatio Catholica* confronts historians interested in Conring's views about religion with a difficulty similar to the one that led Lampadius astray. They can examine Conring's performance of a role that he adopted in order to achieve a particular effect. But they cannot examine what Conring actually believed. They see a mask. But why did Conring choose to wear that mask? Was it a theological commitment? Or was it just a matter of pure politics? Was Conring seeking to subordinate religion to reason of state? Or was he quite on the contrary promoting religious unity? Did Conring have a kind of faith? If so, what kind? What, in short, did Hermann Conring think about religion?

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5 Conring [Irenaeus Eubulus], *Pro pace perpetua Protestantibus danda consultatio Catholica* (1648), reprinted in *Opera*, 2:472–517. About ten years later Conring republished the *Consultatio Catholica* as the first item in a collection of closely related documents, including Wangnereck's *Iudicium*. This time he published it under his own name and called the whole collection *De pace perpetua inter imperii Germanici ordines religione dissidentes servanda libelli duo* (1657). Twenty years after that he published a revised edition of the same collection under the title *De pace civili inter imperii ordines religione dissidentes perpetuo conservanda libri duo* (1577 [i.e., 1677]). This is the version reproduced in *Opera*, 2:467–566. Note the omission of *Germanici* in the title and the shift from *pax perpetua* in 1648 and 1657 to *pax civilis perpetuo conservanda* in 1677.

6 "Caeterum quaestio ardua est, num talis perpetua pax Protestantibus, hoc est, haereticis, a S.C.M. et reliquis catholicis imperii Romani Ordinibus salva conscientia possit concedi." *Opera*, 2:473.

7 See *Opera*, 2:472, and cf. Dickmann, *Der Westfälische Frieden*, 414. On Lampadius see Dietrich, "Jacobus Lampadius."

1 Conring's Confessional Writings

At first sight there may seem to be an easy road to answering those questions. The *Consultatio Catholica* was, after all, not Conring's only writing on matters {321 | 322} of religion. On the contrary, the evidence for his ideas about religion is abundant. How abundant can be illustrated by a quick look at the bibliography that William Kelly and Michael Stolleis compiled in 1983.[8] Eighty-seven items on the list of Conring's published writings were printed in the thirteen years from 1648, when the *Consultatio Catholica* was published, to 1660, when Conring began to focus more exclusively on questions of politics (including both 1648 and 1660, but without counting either the numerous reprints that Kelly and Stolleis identify along with the originals, or the occasional German translations of writings that were first published in Latin). Twenty-five, more than a quarter, deal more or less directly with questions of religion; thirty-eight deal with politics, history, and law; and the remaining twenty-four deal with medicine, Conring's original profession.

Classifying Conring's writings in this way is of course a little arbitrary. How, for example, should one classify the *Gründlicher Bericht von der landesfürstlichen ertzbischöfflichen Hoch- und Gerechtigkeit über die Stadt Bremen* or *Thorough Account of the Majesty and Jurisdiction the Territorial Prince and Archbishop Has over the City of Bremen* published in 1652? It deals with episcopal authority. Is that a matter of politics or of confessional dispute? Moreover, in the 1660s Conring wrote less about religion than before. Out of fifty-two items listed by Kelly and Stolleis for the years 1661–70, only eight were clearly devoted to religion. But that was still more than the six devoted to medicine, and it included a book that deserves to rank among the most important pieces Conring ever wrote about religion: the *Pietas Academiae Juliae* of 1668.[9] The *Pietas Academiae Juliae* was Conring's public, emphatic, and systematic declaration in favor of his mentor, Georg Calixt (1586–1656), against Calixt's orthodox Lutheran opponents in the theological battles that had broken out into the open with the so-called Latermannsche Händel in 1648 and raged into the 1680s. He had it sent to Protestant courts, consistories, and universities in order to ensure the recognition that he wanted. In Johannes Wallmann's judgment it played a crucial part in the single most important battle dividing

8 Kelly and Stolleis, "Gedruckte Werke."

9 Conring, *Pietas Academiae Juliae programmate publico prorectoris et senatus academici adversus improbas et iniquas calumnias cum aliorum quorundam tum D. A. Strauchii asserta* (1668).

Lutheranism after the Reformation by putting Lutheran orthodoxy on the defensive.[10]

There surely is no lack of evidence for Conring's views about religion. Yet it does not take long to recognize that the road to understanding Conring's ideas about religion is not as easy as the volume of the evidence suggests. True, he expressed himself often. But usually he expressed himself in terms that were {322 | 323} defined by others. In fact, some of the items on the list of Conring's confessional writings consist entirely of works by other authors that Conring simply re-edited because he wished to publicize their views.[11] Some consist of annotations on writings by other authors that he regarded as particularly important.[12] Most commonly he reacted to attacks from his opponents. Such was of course the case with the *Consultatio Catholica* itself, provoked by the publication of Heinrich Wangnereck's *Iudicium theologicum*. Such was also the case with the *Vindiciae Pacificationis Osnabruccensis et Monasteriensis*, published in 1653 in order to rebut Pope Innocent X's annulment of the Peace of Westphalia.[13] Such was the case again with the *Defensio ecclesiae Protestantium* of 1654, to mention only three prominent examples of the polemics that constitute the bulk of Conring's confessional writings.[14]

Most of the evidence, in other words, testifies to Conring's engagement with the views of others. Hardly ever does he seem to have written down just what he regarded as central to his faith. This is true even of a document as clearly designed to make one theological position prevail over another as the *Pietas Academiae Juliae*.[15] Conring declares it quite unnecessary to engage directly

10 Wallmann, "Helmstedter Theologie," 36–7, 47–8, with references to the pertinent literature.

11 Thus he edited the works of Georg Witzel and Georg Cassander, two sixteenth-century Catholic authors who had devoted themselves to the cause of religious peace. See Conring, ed., *Via regia* (1650), and Conring, ed., *Georgii Cassandri et Georgii Wicelii De sacris nostri temporis controversiis* (1659).

12 See his annotations on Grotius's *De veritate religionis christianae* in *Opera*, 5:1–105. These were not published in Conring's lifetime.

13 Conring, *Vindiciae Pacificationis Osnabruccensis et Monasteriensis* (1653). This was published under the pseudonym Ludovicus de Montesperato.

14 Conring, *Defensio ecclesiae Protestantium* (1654). Wallmann, "Helmstedter Theologie," 52n43, suggests that the *Defensio* may have been written in response to a request from Johannes Schwartzkopf, the chancellor of Brunswick-Wolfenbüttel, who wanted arguments to counter the bad precedent that had just been set by the conversion of the oldest son of the count of Nassau to Catholicism. For more examples of Conring's polemics see Mager, "Conring als theologischer Schriftsteller."

15 The closest he ever seems to have come to venturing on to explicitly theological terrain is his *De purgatorio animadversiones in Ioannem Mulmannum* (1651).

with the writings of Calixt and his opponents. Instead he concentrates on defending the university and the church against the calumnies of their enemies on the grounds that even non-theologians must not remain silent when their well-being is under direct assault.[16] What he himself believed remains opaque.

The problem thus is not simply that Conring relied on pseudonyms sometimes. The problem is that even when he did write under his own name, {323 | 324} he did not expose his religious views to public scrutiny. No doubt he stood up for Calixt's theology. No doubt he wanted to promote confessional co-existence on the basis of the Peace of Westphalia. That his writings breathe a certain spirit of toleration and that they are directed against religious intransigence is evident enough as well. Most certainly he thought that no form of religious intransigence was more important to combat than that which he attributed to the papacy. But what were the grounds on which he adopted those positions? Is there anything besides hostility to Catholics and good will for Protestants that holds his views together? Is there a principle, a system, some positive means by which we could attribute coherence to Conring's religious views beyond the unilluminating truth that he opposed the papacy? What would that principle be? Is it theology? Is it faith? Is it philosophy? Or something altogether different?

There are no good answers to those questions in the existing literature. Few of the scholars who examined Conring's life and works have paid attention to his ideas about religion, and those who did have come to different conclusions. Ernst von Moeller, in what remains the most detailed biography, omits to deal with Conring's confessional writings altogether.[17] Erik Wolf, in an influential collection of biographical sketches of significant figures in the history of German legal thought, doubts that Conring was capable of any genuinely religious commitment. From his perspective Conring was an enlightened but somewhat shiftless rationalist with no real interest in religion, a cold and calculating modern thinker with little spiritual depth and a correspondingly weak sense of morality.[18] Inge Mager agrees that Conring's focus was on politics and that his writings on religion are much too disparate to coalesce into a coherent theological position (*theologische Gesamtposition*). Yet she seeks to defend

16 Conring, *Pietas* (1668), 10, 17.

17 E. Moeller, *Hermann Conring* (1915). The sole occasion on which Moeller touches directly on confessional questions concerns Conring's decision in 1631 to accept a position in Brunswick in spite of his misgivings about Brunswick's strict Lutheranism. See ibid., 28, for Moeller's judgmental conclusion: "Wer weiss, wo er geendet hätte, wenn er damals Nein gesagt hätte und sich selber treu geblieben wäre? Tadle ihn, wer es darf! Ich tue es."

18 E. Wolf, "Hermann Conring," 226–7.

Conring against Wolf's insinuations of religious superficiality. She explains his reticence to engage directly in theological debate as the result of uncertainty about religious truth and disagreements with Calixt, and she insists that theology in Conring's mind continued to function as an all-embracing form of knowledge (*eine totale Kategorie*).[19] Michael Stolleis agrees that Conring's views on theology are difficult to ascertain. But in sharp contrast with Erik Wolf he maintains that a strong faith in God supported {324 | 325} Conring's entire way of thinking. For Conring natural science was a means to study God's design, human beings were obliged to follow God's commands, and the mere pursuit of power was never legitimate. From Stolleis's point of view, Conring's ideas about theology lie at the very center of his thought.[20] Perhaps Johannes Wallmann put it best when he declared that Conring the theologian is yet to be discovered.[21]

The purpose of this article is to contribute to that discovery. It proceeds on the assumption that the neglect of Conring's confessional writings is not so much a deficiency in the scholarly literature as an expression of the sound intuition that the significance of Conring's confessional writings is impossible to ascertain until the principles on which they rest are better understood. I will therefore refrain from a direct analysis of Conring's confessional writings, not only for the pragmatic reason that there are more of them than can be studied here, but also because a direct approach seems methodologically premature. I will instead try to gain hold of the principles that held Conring's ideas about theology together by focusing on the preface he wrote for his edition of Aristotle's *Politics* in 1637 and dedicated to Duke William of Brunswick-Lüneburg.[22]

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19 Mager, "Conring als theologischer Schriftsteller," 56, 62, 64–6.

20 Stolleis, "Einheit der Wissenschaften," 22, 23–4.

21 Wallmann, "Helmstedter Theologie," 35.

22 Conring, "Praefatio in Politica Aristotelis ad Illustrissimum Principem Dn. Guilielmum Ducem Brunsvicensium et Luneburgensium," in Conring, ed., *Aristotelis Politicorum libri octo* (1637), 3–74 of the unpaginated front matter; only pages 3–58 of the unpaginated front matter are reprinted in *Opera*, 1:117–28. On the title page the preface is announced as Conring's *prooemium*, but the text beginning on p. 3 bears no title of its own. It presents itself as a dedicatory letter to the duke, beginning "Illustrissimo Principi ac Domino D. Guilielmo . . . Felicitatem." Later printings refer to this as Conring's "Praefatio in Politica Aristotelis," which is the title I shall use. *Opera*, 1:viii and 1:117, uses the same title, but replaces *Politica* with *Politicam*. Note that the preface of 1637 is not to be confused with the "Introductio in Politica Aristotelis" that followed the preface on pages 75–183 of the unpaginated front matter. The introduction, unlike the preface, deals with the text and arrangement of Aristotle's *Politics*. The revised edition of the *Politics* that Conring published with Daniel Heinsius's Greek text in 1656, *Aristotelis Politicorum libri superstites*

2 The Preface to Aristotle's *Politics* of 1637

A preface to Aristotle's *Politics* may not look like a good source of information about Conring's views on religion. In fact, however, it furnishes a lucid statement of Conring's most basic ideas, especially including his ideas about religion. It sketches the history of the empire, offers a diagnosis of the empire's contemporary difficulties, defines the value of political science, and outlines {325 | 326} the proper relationship between politics and religion with a programmatic clarity that leaves little to be desired. It was formulated early in Conring's career, when he was thirty-one, only one year after he obtained his doctorates in medicine and philosophy, and it was never superseded. Conring had it reprinted on at least three separate occasions.[23] The first was in 1654, at the very end of his book on the boundaries of the Holy Roman Empire.[24] The second was in 1666, in a collection of his prefatory letters.[25] The third was in 1677, in a revised edition of the very same *Consultatio Catholica* with which this article began.[26] It shows not only that Conring continued to believe in 1677 what he had written in 1637, but also how directly his reading of Aristotle's

(1656), includes a revised version of the "Introductio," which is reprinted in *Opera*, 3:457–90, but it does not include the preface of 1637.

23 There may have been more. Conring's works were often reprinted, and the reprints often differ from each other in ways impossible to ascertain except by direct inspection. A complete census has not been attempted here.

24 Conring, *De finibus imperii Germanici* (1654), 858[misprinted as 878]–90. The pirated edition of this work published under the same title in the same year by Martin in Lyon does not include the preface to Aristotle's *Politics*. The second edition published by Conring himself in 1680–81, however, *De finibus imperii Germanici, editio nova* (1680–81), 854–90, does include the preface to Aristotle.

25 Conring, *Epistolae hactenus sparsim editae* (1666), 64–94. Goebel omitted the preface to Aristotle's *Politics* from his reprint of the *Epistolae* in *Opera*, 6:346–430, because he had already printed it together with the *De finibus imperii Germanici* in *Opera*, 1:117–28.

26 Conring, *De pace civili* (1577 [i.e., 1677]), 878–96. Following p. 372, the pagination of this volume is thoroughly garbled; see the corrections printed at the end of the volume. Counting forward from p. 372, the title of the "Praefatio in Politica Aristotelis" appears on p. 376, and the text on pages 377–413. On this occasion Conring omitted to reprint the concluding pages of the preface, that is, pages 58–74 of the unpaginated front matter in the original edition of 1637, beginning with the sentence, "In quibus omnibus satis fortassis a consiliis nobis esse poterunt antiqua prudentiae civilis monumenta, ne denuo Bodinum aliquem quis censeat desiderandum." They offer a brief critique of Bodin's account of the empire, describe his initial encounter with the study of political science, and praise his mentor Calixt for his unique understanding of the value of political science. It seems likely that Conring decided to omit them because they were largely autobiographical, bound to personal circumstances forty years out of date, and did not add

Politics was linked to his understanding of the condition of the Holy Roman Empire and the problems of confessional co-existence.

The preface to Aristotle's *Politics* of 1637 can be divided into three parts.[27] {326 | 327} In the first part Conring offers his diagnosis of the condition of the Holy Roman Empire, or German Empire, as he preferred to call it on occasion;[28] in the second part he describes his plans for a therapy by means of political science, particularly political science as taught in Aristotle's *Politics*;[29] and in the third part he addresses the main obstacle preventing such a therapy from taking effect.[30] That obstacle, of course, consisted of disagreements over religion. In a few clearly articulated steps the preface thus explains how the calamity of the Thirty Years War is related to the history of the empire, how the history of the empire is related to the study of politics, and how the study of politics is related to disagreements over religion. It presents the reader with a logical chain of reasoning that runs right through the center of Conring's thought.

A *The Condition of Germany*

In order to gain a clearer sense of how that chain of reasoning was constructed, it will be best to describe the case that Conring makes in the order in which he made it. In part one Conring recounts the empire's decline from the times of

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anything of substance to his argument concerning religious peace. As will be seen below, that argument was self-contained and ended with a nice conclusion of its own.

27 Since Goebel printed the preface to Aristotle's *Politics* at the beginning of the *De finibus imperii Germanici, Opera*, 1:114–28, one is led to assume that he reproduced the version Conring had included at the end of the *De finibus imperii Germanici* in 1654, and repeated in the second edition of 1680–81. But Goebel's edition of the *Opera* does not contain the text of the autobiographical section at the end that is included there. He rather reproduced the truncated version that Conring published in *De pace civili* (1677), 878–96 [misprinted pagination; see preceding note]. After Goebel had already published the first volume of the *Opera*, he discovered certain manuscript annotations concerning details of the history of the Holy Roman Empire. He published these in *Opera*, 2:1–4. See his opening remarks in *Opera*, 2:i. Given the effort Goebel made to publish these notes, it seems unlikely that he omitted the autobiographical conclusion of the preface knowingly. I will pay no further attention to that conclusion, nor will I examine the details Goebel added from Conring's manuscripts. I have also made no effort to trace the sources of Conring's unattributed quotations, which he printed in italics.

28 *Opera*, 1:117–23. For Conring's habit of referring to the Holy Roman Empire as *imperium Germanicum* see, among many other possible examples, the title of *De finibus imperii Germanici* (1654).

29 *Opera*, 1:123–25.

30 Ibid., 1:125–8.

the Ottonians to the present. In the beginning, which is to say, up until the reign of Emperor Henry IV, the empire's power was great. France, Poland, and Hungary were comparatively weak; Denmark and Sweden were more or less under the empire's sway; and Italy was entirely under its control. At that time, Conring believed, the empire would have been able to withstand not just any one among its neighbors but all of them combined.[31] Now, however, the empire had lost the power to determine its own fate, while Poland, France, the Ottoman empire, Sweden, Denmark, Britain, Russia, and Spain had managed to strengthen themselves, either by extending their boundaries or by centralizing power in the hands of the monarch.[32]

The causes to which Conring attributes the empire's decline are manifold.[33] He finds one of them in the natural warlikeness of the German people and the freebooting ways that manifested themselves just as soon as the troubles of Henry IV invited rebellion. Another consisted of the deplorable habit of {327 | 328} German kings even prior to Henry IV to diminish their authority by alienating public goods, compounding their failure to distinguish properly between private and public finance. Then there was the power of the great men of the realm who only sought to build their own dynasties; the division of Germany into heritable counties; the ability of bishops to combine political and religious power in one hand; and Henry IV's miscalculations. When Pope Gregory VII launched his deadly attack against the empire, the authority of German emperors was effectively ruined. Most principalities became hereditary and the conferral of episcopacies and abbacies was removed from imperial control.

Political authority, Conring explains, depends on the ability to inspire fear or to distribute gifts. Once that ability was gone, the subjects of the empire lost their respect for its authority, escaped from central control, and concentrated on accumulating monarchical power over their own subjects. Conring acknowledges that this state of affairs is commonly referred to as the liberty of the estates. But in his opinion the liberty of the estates is but a euphemism for the servitude of the many to those few who managed to cast off the imperial yoke and concentrated power in their own hands in order to wield it all the more effectively over their subjects. The empire, Conring implies, was better qualified than the estates to serve the cause of liberty.[34]

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31 Ibid., 118.

32 Ibid., 122.

33 Ibid., 118–20.

34 Ibid., 120. Recent scholarship on the Holy Roman Empire would appear to corroborate that judgment more effectively than earlier generations of historians deemed imaginable;

There is one cause of the empire's decline, however, that Conring considers worse than all the rest. That cause is religious strife.[35] Just when the creation of imperial circles was raising modest hopes that the empire's organization might recover some solidity, all hopes were dashed by civil war over the question of religion.[36] Whether the religious disagreements were genuine or merely a convenient pretext for political advantage, there is no doubt in Conring's mind that they divided Germany into factions more bitterly opposed to one another, and more destructive of good public order, than anything previously seen in German history. All other troubles looked harmless by comparison. For now the question was no longer merely how to preserve internal unity. Now the survival of Germany itself hung in the balance.[37]

Conring's analysis of the empire's contemporary condition concludes with a gloomy assessment of the difficulties ahead. Inaction was certainly no option. {328 | 329}

> If you are surrounded by other powers, you cannot preserve your safety by doing nothing. Where the goal is domination, your peace and tranquility are nothing but an incitement to others to reduce you to slavery.[38]

That German unity must be restored was obvious.

> If we could act in harmony, and if we could agree with one another on what we want and what we do not want, there is no doubt that our immediate and our more distant neighbors could not harm our empire with impunity, even if they were all united.[39]

But it is difficult to see how national unity could possibly be brought about. In the first place, a people engaged in civil war is so deeply absorbed with its own affairs that it tends to forget its foreign enemies. It does not even recognize the danger it faces from abroad. It acts as though it were invisible to all the world

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see Vann, *Making of a State: Politics and Society in the Holy Roman Empire*; and Aretin, *Das Alte Reich*.

35 *Opera*, 1:120–1.

36 On the imperial circles see Dotzauer, *Die deutschen Reichskreise*.

37 *Opera*, 1:118, 121.

38 "Neque vero inter potentes tuto quiescas. Ubi dominatus quaeritur, pax et tranquillitas tua irritamentum est servitutis." *Opera*, 1:123.

39 "Ac certe non etiam nostrum hoc imperium vel uniti vicini populi omnes, vel remotiores quique lacesserent impune, si concordes ageremus, et idem volentes idem nolentes consuleremus in commune." *Opera*, 1:123.

and had none but friends beyond its borders. Hate for its neighbors can blind the weaker party in a civil war so thoroughly that, rather than face defeat at home, it expects salvation from enemies abroad and enters into alliances with foreign powers. That hardly helps the cause of unity.[40]

In the second place, an end to civil war is not at all the same as restoring national unity. Assume one party wins a decisive victory.

> Who is there who does not want to dominate his enemies if he can, or would not wish to return the state to a condition that, if his wish came true, would make it impossible for him to be in the position in which he actually finds himself?[41]

It is, in other words, not merely impractical to try to reverse the results of civil war; it is logically inconceivable. The very desire to go back to how things were before the war broke out proceeds from memories of past injustices and fears of revenge that presuppose the destruction of the very condition the victor is pretending to restore.[42] There is no going back. Moreover, {329 | 330}

> the power to rule is too sweet, and nothing is commonly considered to be sweeter than the power to control one's enemies. [The unfortunate consequences of] victory in civil war should therefore not be held against the victor, but against whoever heedlessly provoked the war. For starting that kind of war is malicious in the extreme, whereas refusing to abandon power won by arms is just a common human failing.[43]

The unfortunate truth of the matter is that

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40 *Opera*, 1:123.

41 "Quotus vero quisque est, qui, cum possit, non etiam velit dominari hostibus devictis, aut rempublicam illo rursum loco cupiat esse, quo cum esset, ipse non poterat esse loco suo?" *Opera*, 1:123.

42 The analytic precision of Conring's recognition that a difference in temporal location is sufficient to establish a categorical difference between otherwise identical sets of circumstances (the conditions that obtained before the war broke out, and the identical conditions that the victor would like to restore) is a good indication for his grasp of the logic of historical knowledge that forms the subject of Danto, *Narration and Knowledge*.

43 "Nimis dulce est regnare: nihil dulcius certe vulgo aestimatur, quam hostibus imperare. Sic scilicet fere res est: ut dominatus ex victoria civilis belli natus non tam vitio vertendus sit victori, quam illi qui belli auctor temere fuit: quum movere istiusmodi bellum malitiae plerumque sit extremae, dominatum armis partum nolle dimittere, communis hominum impotentiae." *Opera*, 1:123.

> a country divided by civil war is exposed to attack, not only from abroad, but from its own citizens, and from none more so than from those who manage to win a decisive victory, even if they happen to be your friends and share the same religion.[44]

The clarity with which Conring rejects victory and the confessional belief of the victors as a reliable foundation for the restoration of political order is remarkable. But matters are hardly better if victory is any less one-sided. As soon as one party prevails, it will promote factionalism. Even in the unlikely event that civil war concludes with a perfect balance between the contending parties, the wounds that they inflicted on each other will be remembered "in a dark corner of the mind." In sum "the true friendship and firm association without which no commonwealth can flourish will not be easy to restore."[45]

B *Political Science as Therapy*

In the second part of his preface Conring proposes a therapy for the problems he has described in the first. That therapy consists of studying political science in general and Aristotle's *Politics* in particular. He begins on a somewhat defensive note, declaring that he has no desire to impose his views on those who are obliged by birth or oath to care for the commonwealth.[46] He seems to have feared that it might not have been regarded as appropriate for him to meddle in political affairs because his appointment at the University of Helmstedt obliged him to teach natural philosophy from 1632–37 and medicine thereafter. It was not until 1650 that he was formally appointed to a chair of politics. In his excuse he mentions the private ills {330 | 331} arising day in, day out, from the convulsion of the public order. They make it impossible for him to remain completely silent. The common people have a right to complain about their suffering at the hands of the rulers of this earth, and they may even be obliged to raise their voices when the rulers of the earth are tottering. But the main reason why Conring regards himself entitled to speak out is that his business (*negocium*) consists not only of knowledge in general (*eruditio*), but also of knowledge of politics in particular (*civilis sapientia*). Unless he is very much mistaken, Germany's ills flow in large measure from failure to heed the truth

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44 "Neque tamen externis tantum patet ad ictum civitas suis dissidiis, sed et ipsis civibus, ipsis amicis ejusdemque sacramenti hominibus, maxime ubi veram atque sine exceptione victoriam aliqui expresserint." *Opera*, 1:123.

45 "Quod etsi aequis partibus finiatur contentio, maneat tamen *repostum alta mente* inflictum utrinque vulnus, haud rursus coeunte facile vera amicitia ac firma societate; qua sine tamen nulla civitas est salva." *Opera*, 1:123.

46 *Opera*, 1:123–4.

(*philosophia*). No one whose job it is to teach true philosophy can therefore very well avoid addressing himself to Germany's political travails.

With this emphatic declaration that men of knowledge cannot fulfill their calling unless they accept responsibility for their role in politics, Conring hits his stride.[47] He draws on the analogy with medicine: as a physician needs to know the illness in order to be able to demonstrate the value of medicine, so someone wishing to establish that political science (*civilis prudentia*) is not merely useful, but necessary to the common good, must understand the ills afflicting the commonwealth. Ignorance of the principles of monarchical government is the reason why the kings of Germany lost their authority. Ignorance of the art of government led a misguided people into armed rebellion against its rulers. If political science had been properly understood, the authority of German kings would have survived intact, or at the very least Germany would have known how to transform itself into a proper aristocracy, on the Venetian model, and not descended into utter confusion. Just as neglect of political science has been the main cause for Germany's deterioration, so the study of political science affords whatever hope is left for Germany's restoration.

> Where would a collapsing commonwealth find more effective assistance and protection from total ruin than in the doctrine that alone can tell what must be sought and what avoided in public affairs, that alone estimates both risks and damages, that carefully weighs hopes and fears, and that alone knows how to treat the disease?[48]

It may be worth stressing that Conring's understanding of political science is of course not identical to that maintained by members of the academic discipline carrying the same name today; the differences are significant.[49] But {331 | 332} it is crucial to realize that he does regard it as a science. To be sure, his favorite way of referring to it is *civilis prudentia*. But he refers to it as *politica*

47 *Opera*, 1:124.

48 "Et vero undenam collabescens aliqua republica praesentius capiat auxilium ac ruinae suae fulcimentum, quam ex illa doctrina, quae sola novit quid fugiendum publice quid appetendum sit, quae sola pericula damnaque expendit, quae denique spe metuque utrinque libratis sola non ignorat medicinam malorum?" *Opera*, 1:124.

49 In brief, Conring regarded science as complementary to history. History consisted of empirical facts obtained by direct observation or by relying on direct observations reported by others. Science consisted of rational explanations of those facts by means of universally valid causal relations. Cf. above, chap. 8.

scientia, civilis philosophia, and *civilis sapientia* as well.[50] More important, the difference between *civilis prudentia* and *politica scientia* is not, appearances to the contrary notwithstanding, the difference between a virtue and a science. The difference is that *politica scientia* means political science as such whereas *civilis prudentia* means political science as applied in practice. The difference turns on a technical distinction in Aristotelian philosophy between the different ways (what Conring calls *habitus*, and Aristotle ἕξις) in which the same knowledge can manifest itself. Where that difference does not demand special attention, *politica scientia* and *civilis prudentia* can serve as synonyms. In Conring's view both are expressions of what he simply calls *politica*, and he leaves no doubt at all that *politica* is a science in the strict sense of the term. As he puts it in his *Miscellaneous Theses on Civil Prudence*:

> *Prudentia civilis* and *politica* are different words for the same thing. . . . *Civilis prudentia* deals exclusively with the characteristics of bodies politic in and of themselves. Whatever is not characteristic of bodies politic in and of themselves falls outside the scope of *politica scientia*. . . . We maintain that *politica* is a true science in the strict sense of the term. But it can also be considered a [kind of] *prudentia*, because an expert in this science is well equipped to govern a commonwealth.[51]

The significance Conring attributes to political science is evidently great. {332 | 333} But he is careful not to exaggerate its power. Even political science cannot foretell the future. Political science can make predictions of a certain kind. But such predictions are subject to the same limits that circumscribe all forms of human knowledge. "Nature has hidden many things beneath a sacred cover,

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50 For examples see Conring, "Praefatio de historiarum, Germanorum inprimis, studiis" (1635), *Opera*, 5:253–78; *Theses miscellaneae de civili prudentia* (1650), *Opera*, 3:277–80; *De civili prudentia liber* (1662), *Opera*, 3:280–421; and *Propolitica sive brevis introductio in civilem philosophiam* (1663), not included in the *Opera*.

51 "Vox Prudentia civilis, idem quid notat ac vox Politices. . . . Ad civilem prudentiam pertinent eae solae affectiones, quae de civitate primo ac per se praedicantur. Quae vero reipublicae primo ac per se non insunt, a Politica scientia aliena sunt. . . . Nos politicam vere et proprie dictam scientiam esse affirmamus. Potest etiam prudentia censeri, in quantum videlicet hac scientia imbutus quis redditur aptus reipublicae gerendae." Conring, *Theses miscellaneae de civili prudentia*, nrs. 1, 63–4, 83–4 (1650), *Opera*, 3:277–80. Conring made the same point at much greater length in *De civili prudentia* 8–9, *Opera*, 3:318–37. For background see Aubenque, *La prudence chez Aristote*, esp. 33–41; Sellin, "Politik"; and W. Weber, *Prudentia Gubernatoria*.

and no mortal human being is permitted to know everything."[52] Again he draws on the analogy with medicine: in an acute illness predictions of recovery or death are never certain. Illnesses of the body politic are similar: to the extent that they are acute (*acutum aliquid*), they are subject to scientific analysis. But they also include an element of unpredictability (*fatale aliquid*). That element comes from God, and since it comes from God, it is only for God to know.[53]

One must accordingly distinguish between things that can, and that cannot, be predicted. But that does not detract from the value of political science as such. Much less does it afford an argument for predictions made on other than scientific grounds.

> To the extent that such matters are possible to penetrate with human ingenuity at all, neither the stars nor the birds teach them to us, but only the oracles of prudence. They will more readily reveal the remedies for our ills to us than Delphi ever did to ancient Greeks. They are uncorrupted counsellors, free of hate, fear, and hope. For they alone keep their distance from the causes of such emotions.[54]

The oracles of prudence (*prudentiae oracula*). With that crucial and wonderfully telling phrase Conring establishes that the pursuit of science is not at all a matter of religious neutrality. As the jealous God of the Old Testament refused to tolerate other divinities, so the jealous God of science refuses to tolerate other forms of knowledge. Conring has nothing but contempt for oracles of any other kind and does not hesitate to brand them as superstition.

> In such matters there is no reason for consulting Ammon, beseeching Delphi, inspecting entrails, observing the flight of birds, or questioning our Chaldeans last of all—methods we perceive to be dear to many people in spite of their having been repeatedly prohibited by divine and human law. Those kinds of seers are not {333 | 334} inspired to foretell the

52 "Solus in hisce prudens sapit. Soli illi datum imminentia non nescire. In quantum sane futurorum capax est humanum genus. Etenim *multa tegit sacro involucro natura, nec ullis fas est scire quidem mortalibus omnia.*" *Opera*, 1:124.

53 *Opera*, 1:124. This clearly reflects Conring's knowledge of Aristotle's views on so-called future contingents. For a lucid contemporary analysis of this issue see Danto, *Narration and Knowledge*, 183–200.

54 "Quaecunque tamen humano in his sunt ingenio pervia, illa profecto non astra, non aves docebunt, sed prudentiae oracula. Ab illis etiam promptius remedia malis nostris impetrabimus, quam Graeci olim Delphis. Haec incorrupti consiliarii, absque odio, absque timore et spe; ut quorum et causas sola habeant procul." *Opera*, 1:124.

> future by means of art or science. They are superstitious fortunetellers and impudent soothsayers who give directions to others without knowing their own way.[55]

Science can conquer superstition, but only if its advice is closely heeded. Science may not be taken up or dropped at will. While things were going well, it was perhaps permissible not to pay much attention. But in the face of Germany's destruction that is no longer so.

> When the wind is favorable and the skies are clear, on the high seas, far from the rocks, the rudder can safely be entrusted to anyone. But on the sandbanks or when the north wind is raging, our safety depends upon the skipper. Thus, so long as the commonwealth is at peace, one need perhaps not always call on the counsel of political science. Under those circumstance even ordinary people picked randomly from a crowd can govern reasonably well. But now the world is being turned upside down. Every mistake can have a lethal consequence. Continuing to live according to the old ways under such circumstances, if I am not completely wrong, would both be a horrendous crime and the height of madness.[56]

Science, moreover, is more than just an instrumental form of knowledge or a diversion for the curious, and it does more than merely to reveal the means by which Germany's unity can be restored. Science is in and of itself one of those means because it pleases God.

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55 "Neque enim est quur in his negotiis, aut Ammonem consulamus, aut petamus Delphos, aut inspiciamus exta, aut aves observemus, aut postremo Chaldaeos nostros interrogemus; quod nunc etiam tot post interdicta divina humanaque multis cernimus esse familiare. *Non enim sunt ii aut arte divini aut scientia, sed superstitiosi vates, impudentes harioli, Qui sibi semitam non sapiunt alteri monstrant viam.*" *Opera*, 1:124.

56 "Ut enim impetrent veniam suae negligentiae tempora antecessa, haec certe nescio qui inveniant. Scilicet ut secundo vento aut tranquillo caelo, inque alto, longe a rupibus, sine periculo clavus navigii cuivis etiam committitur; inter Syrtes vero aut depraeliantibus Aquilonibus ad solum tuto nauclerum recurrimus: sic quieta adhuc republica fortassis licuerit non advocare semper prudentiam civilem in consilium, et potuerint illam non male moderari vel de trivio homunciones; at nunc quando summa imis vertuntur, quumque error quilibet habeat quid lethale, profecto moribus illis (nisi totus fallor) vivere et nefas magnum et summa dementia fuerit." *Opera*, 1:124.

> Not to want to know is in and of itself an offense against God, as wanting to know is to obey God's laws. Confusion spreading throughout the mind is certain evidence for the wrath of God.[57]

Of course God helps the stupid every now and then. But that does not make stupidity a good example or a reliable defense.[58] Science is a religious {334 | 335} obligation. God grants his favor only to people who do not hide from truth, and God hides the truth from people who refuse to do his will.

> We have provoked the wrath of God with countless sins. Once his wrath has been placated, I hope that foresight and hard work will restore German affairs to integrity, as if by a ceremony of *postliminium*; that the original honor of the people will return; and that the liberty of the estates will be moderated by monarchy in such a fashion that we must neither fear the wilfulness of princes nor the licence of the estates, but that the sacred authority of the laws will constrain all to fulfill their proper function.[59]

Science, in other words, is the best hope that Conring has for overcoming the destructive selfishness that has divided Germany and that prevents the parts from restoring the unity on which their prosperity depends. Science is the pursuit of knowledge, and the pursuit of knowledge is a religious offering, a sacrifice intended to propitiate a deity visiting its wrath upon a sinful people.

C. *The Nature of Heresy*

In the third part of the preface Conring turns to what he regards as the greatest obstacle that must be overcome for Germany to reap the benefits of science. That obstacle, of course, consists of religious disagreements. He begins conventionally enough.[60] He calls religious disagreements the single most

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57 "Nolle sapere, hoc ipsum est Deum offendere: ut velle, ejus est legibus obsequi: certumque est divinae indicium irae caligo menti offusa." *Opera*, 1:125.

58 *Opera*, 1:125.

59 "Et certe placata numinis indignatione, quam innumeris hactenus peccatis irritavimus, restituetur providendo ac laborando quasi postliminio in integrum etiam res, (quantum spero) Germanorum, redibitque pristinum gentis decus, ita libertate Ordinum temperato Principatu, ut neque in hoc libidinem neque in illis licentiam habeamus metuere, sed sacra legum auctoritate cuncta in officio contineantur." *Opera*, 1:125. *Postliminium* is the ceremony by which Roman citizens who had been captured and fallen into slavery were restored to their civic rights; cf. Berger, *Encyclopedic Dictionary*, s.v. 'postliminium.'

60 *Opera*, 1:125.

important cause for the murderous slaughter in which Germany is threatening to consume itself. He indicts religious hatred as an unjustifiable, indeed, inhuman form of superstition and likens it to the misguided zealotry of Jews (*furores Judaicorum zelotarum*) who think it wrong to show the way to, or accept gifts from, anyone besides other Jews. He insists that neither the true faith (*rationalis pietas*) nor the Mosaic law lend their support to such a lack of humanity, and he invokes as proof the water Christ accepted from the Samaritan woman and the parable of the good Samaritan.[61] He reminds his readers that Christians are commanded to love their enemies. Of course he recognizes that St. Paul prohibits communion with heretics. But in his judgment the Apostle's strictures only apply where heresy has been established beyond a doubt. They do not apply to anyone for whom there is still hope, much less to people seduced into heresy by others.

That sounds like a disappointing mixture of anti-Judaism, empty pieties, {335 | 336} and vain admonitions to Christian charity. Indeed, that Conring appears to have considered Christ's example as probative for Jews points to the limits of his own humanity. What follows, however, amounts to a radical assault on confessional identity. The crucial passage is worth quoting in full:

> Here I will not engage in debates about the question whether any of the contending parties ought to be indicted for some kind of heresy, or to which of them the charge in fact applies. But this I do consider certain: true heresy does not consist of error, but of the pertinacity with which the error is maintained. Lethal ideas sometimes rise up in people of good character. There is no inconsistency between having a Catholic mind and holding a heretical opinion, just as a person acting with entirely good will is capable of committing iniquities. What is it that moves us to think worse about each other than Salvian, priest of ancient Marseille and a man of undisputed sanctity, thought of the Arians? "They are heretics," he said, "but unknowingly; they are heretics only in our eyes, not in their own. For they are so certain of their own adherence to the Catholic faith that they charge us with heresy. What they are in our eyes, we are in theirs." And a little later he adds, "Thus they err, but in good faith, not out of hatred of God or partiality, but believing themselves to honor and love God. Although they may not have the right faith, they judge it to be the

61 *Opera*, 1:125; cf. John 4:8–42, Luke 10:30–7.

> perfect love of God. No one can know how they are to be punished for the error of their false opinion on judgment day, except the judge himself."[62]

Relying on Salvian for support, Conring thus draws a radical distinction between the quality of a person—what he calls the *ingenium*—and the beliefs that person may express. He insists that in and of itself there is no necessary relationship between the former and the latter. A good person can do bad things out of good will; a person with a Catholic mind can hold heretical opinions; and though Conring does not say so, one suspects that he considered the reverse equally true: a bad person can do good things out of bad will, and heretics can hold Catholic opinions. There is no uniform relationship between character, action, and belief; human beings are no more {336 | 337} able to judge the quality of a person than to predict the future. As only God can know whether or not the sick will actually die, so only God can judge who actually is a heretic.

From this premise Conring goes on to draw a series of momentous conclusions. First, he acknowledges the terrifying power of belief to blind those whose belief it is to the possibility that others may hold their own belief in equally good conscience.

> Great is the power of inveterate belief over both parties, as if it had been mixed with mother's milk, like a disease that, if it is exacerbated by partisan zeal, strikes its victims deaf and blind, as Galen agrees, and that, if we believe him, is more impossible to cure than leprosy.[63]

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62 "Non equidem disputabo hic, sitne partium aliqua haereseos nomine infamanda, vel in quamnam earum merito hoc congruat probrum; id certum arbitror, verum haereticum non tam errore quam errandi pertinacia censendum esse, et posse interdum lethales sententias non pessimis ingeniis innasci, adeoque cum haeretica opinione nonnunquam catholicum animum consistere; plane ut agere iniquum quod etiam minime iniquus potest. Quid nos movet vero, quur peius de nobis invicem suspicemur, quam de Arianis sanctissimus Massiliensium olim presbyter Salvianus? *Haeretici sunt*, dicebat ille, *sed non scientes: denique apud nos sunt haeretici, apud se non sunt: nam in tantum se catholicos esse judicant, ut nos ipsos titulo haereticae pravitatis infament. Quod ergo illi nobis sunt et hoc nos illis.* Paulo post subjungens: *Errant ergo, sed bono animo errant, non odio sed affectu Dei; honorare se Dominum atque amare credentes. Quamvis non habent rectam fidem, illi tamen hoc perfectam Dei aestimant caritatem; et qualiter pro hoc ipso falsae opinionis errore in die judicii puniendi sunt, nemo potest scire nisi judex.*" *Opera*, 1:126. Cf. Salvian, "De gubernatione Dei," *PL* 53:95–6.

63 "Magna scilicet vis est in utramque partem opinionis inolitae, quaeque ceu cum materno lacte immulsa est, si accedat cumprimis sectae studium, morbus, Galeno etiam meo judice, quavis scabie insanabilior, quo qui tenentur, si eidem credimus, coeci atque surdi

Second, Conring does not abandon his conviction that heresy exists and must be punished. But he defines heresy on grounds entirely different from religious belief.

> The true heretic is someone who is driven by arrogance or love of fame to found or foster a sect and who disturbs the public peace of the church with factions.[64]

Religious belief thus is irrelevant to prosecutions for heresy in all courts but one: the court where God himself presides. A few years later Conring would justify the irrelevance of religious belief on two specific grounds: first, because invincible error constitutes a valid defense, and second, because it is strictly impossible to determine whether the error on which any particular instance of false religious belief could be said to rest is vincible or not.[65] As far as human courts are concerned, that leaves only deliberate and freely acknowledged violations of conscience and disturbances of the public order as potential grounds for heresy.

Heresy thus turns on action, but only action of a specific kind, namely, action that divides the good of the individual from that of the community. {337 | 338} You may believe what you like, and in a sense you may even do what you like; but you may not divide yourself from the community. To believe that your own good is incompatible with the good of all is arrogance and love of fame; to act on that belief is to promote a sect; to continue to promote a sect when asked to stop is pertinacity; and pertinacity must be restrained.

Third, Conring distinguishes sharply between followers and leaders.[66] He has no mercy for instigators of heresy. Nor are their followers to be regarded as completely free of blame. But since the followers are not themselves propelled by partisan zeal, the proper course of action is not to threaten but to enlighten them. They suffer from a deception. Force may possibly have to be used, but it must never even seem to be directed at their destruction. They must be treated

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reddi consuevere." *Opera*, 1:126. Cf. Wittgenstein's beautifully clear statement of the same basic point: "One can mistrust one's own senses, but not one's own belief. If there were a verb meaning 'to believe falsely', it would not have a meaningful first person present indicative." *PPF* §§ 91–2.

64 "Non ego pravae pervicaciae sum patronus, nec veniam peto vere haeretico homini, h. e. quem arrogantia aut nominis amor sectam facit condere aut fovere, quique factionibus turbat publicam Ecclesiae tranquillitatem." *Opera*, 1:126.

65 See Conring's letter "De haeresi et haereticorum poenis" of 23 June 1641 (Feria IV Trinitatis) to Justus Gesenius in *Opera*, 6:631–3.

66 *Opera*, 1:126.

gently until they understand that their opponents hate, not their persons, but only, exclusively, their beliefs.

Fourth and finally, Conring insists that public peace does not depend on the establishment of religious unity.

> I want nothing other, illustrious Prince, than that each and every one of us in our entirety be called upon in earnest to face the perils disturbing our commonwealth, so that minds presently torn asunder and dispersed by faction will be restored to concord and devotion to the commonwealth in every way. There is no reason whatsoever, not even the religious controversies by which we are afflicted, not to separate our private opinions from the pursuit of concord and public peace. For the religious hatred engaging our citizens does not arise from the law of faith, but from a mindless superstition.[67]

Here Conring's argument has reached its culmination. It is not faith but superstition that causes hatred and religious war. Superstition, not true faith, maintains that only one kind of religious faith can lead to peace. Superstition forges a meretricious bond between the common good and individual opinion that only accomplishes the opposite of what it promises. It makes people hate their neighbors and judge them in lieu of God. It blinds them to the truth that their own faith looks as heretical to others as other faiths look to themselves. True faith must be emancipated from slavery to superstition. That can only happen if the pursuit of peace is segregated from the search for religious truth.

In his concluding observations Conring describes the task that lies ahead. {338 | 339} He quotes church fathers like Cyprian, Optatus, and Gregory of Nazianz to support his view that friendship with people caught in religious error is possible. He evokes the ideal of a commonwealth united with Christ in body, blood, and soul and balances it against the looming threat of a division like that which Rehoboam and Jeroboam caused between Israel and Juda. He concludes with a call for an end, not only to military hostilities, but also to the relaxation of public morals and the manifold forms of crime to which the war has given rise.

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67 "Ego vero nihil aliud volo, Illustrissime Princeps, quam periculis in quibus patria versatur praesentissimis, omnes omnino, quotquot sumus, serio admoneri, ut animi divulsi et factionibus distracti omnibus modis reducantur ad concordiam et commune reipublicae studium: nihil vero esse, ne religionis quidem queis laboramus controversias, quur saltim a curis concordiae et pacis civilis cogitationes nostras segregemus: quod enim hinc hostilia inter cives odia exerceantur, non tam pietatis lege fieri quam inani quadam superstitione." *Opera*, 1:126.

> What is the point of pondering the strength and the authority of law amidst pure violence and crimes that have long since forced every law under their power and now undermine the very foundations of the commonwealth? Justice suffers in any kind of war, and our military has long since become corrupted. But in a civil war, as ours has mostly been, the very idea of law dies too.[68]

Conring does not profess to know specifically how obedience to the laws is to be restored. But that is not his task. "In human affairs the story is always the same; only the persons change."[69] There is accordingly no better course of action than to heed the remedies for civil war that Aristotle advocated centuries ago. Conring concludes with an expression of his hope:

> that in reality things will turn out for us the way they do for trees when they are split apart by wedges. As the splits close up again with extraordinary force and in a single instant the moment the wedges are removed, may all of us return to concord and unity the moment those who now divide us at their pleasure have been cast out.[70]

3 Political Unity and Religious Diversity

By no means was every point that Conring made new. His quotations from the church fathers alone are enough to show how deeply he was indebted to antiquity. Tradition, moreover, had long held that heresy did not simply {339 | 340} consist of heterodox belief.[71] Conring's stress on pertinacity was not

68 "Quid enim inter meram vim et scelera, quae dudum leges omnes suam in potestatem traduxerunt, et jam fundamenta reipublicae subruunt, cogitemus legum robur atque auctoritatem: Scilicet inter arma etiam alias justitia prolabitur, neque nuper primum militia nostra coepit corrumpi; inter civilia autem arma, qualia hactenus magnam partem fuere nostra, etiam moritur ius." *Opera*, 1:127–8.

69 "Eadem quippe semper fabula agitur humanarum rerum, tantum mutantur personae." *Opera*, 1:128.

70 "Spero autem nobis usu eventurum, id quod arboribus qui cuneis divelluntur. Scilicet ut illae excussis cuneis magno impetu unoque momento ad sese redeunt, ita ad concordiam atque unitatem redituros nos omnes, ubi rejecti fuerint, qui nos ad libidinem suam distrahunt." *Opera*, 1:128.

71 "A heretic, by canonical definition, was one whose views were 'chosen by human perception, contrary to holy scripture, publicly avowed and obstinately defended'." Moore, *Formation of a Persecuting Society*, 68, with reference to Gratian, *Decretum*, C. 24 q. 3 cc. 27–31, in *Corpus iuris canonici*, 1:997–8.

unprecedented. Nor could it be said that Conring was fully satisfied with every aspect of his argument. He waffled over St. Paul's treatment of heretics. As late as 1641 he wrote to his friend Justus Gesenius that he felt unsure about the proper penalties for heresy.[72] He did not yet have much to say about just how he envisioned religion and politics to be related in the future. It would take time and further writings before he could speak with confidence about the difference between natural and revealed religion, the principle of human fallibility, and the impossibility of knowing who held heretical beliefs, as opposed to the possibility of knowing who disturbed the public order.[73]

And yet, when all due qualifications have been made, Conring's preface to Aristotle's *Politics* of 1637 testifies to a basic shift in the relationship between religion and politics. In Conring's mind the boundaries between the sacred and the profane were redrawn in such a way that religious diversity could be envisioned without any necessary threat to political unity. In 1677 Conring would say it clearly:

> Without mentioning examples from antiquity, our age itself exhibits many cases of flourishing commonwealths in every corner of the world where there is much religious diversity without any damage to political unity.[74]

The main ingredient in this shift was the elimination of confessional belief from the relationship between the person and the political community. Confessional belief, Conring maintained, was utterly irrelevant to the question whether a person did or did not qualify as a good member of the community. Given the fierce intensity with which people had staked their {340 | 341} existence on one or another kind of confessional belief, and the violence to which

72 "De haeresi et haereticorum poenis" of 23 June 1641 (Feria IV Trinitatis) to Justus Gesenius, *Opera*, 6:632.

73 Most of his uncertainties seem to have been settled by 1646. See his second letter "De haeresi et haereticorum poenis" to Gesenius, dated 28 May 1646, *Opera*, 6:633–6, and especially his *Exercitatio politica de maiestatis civilis autoritate et officio circa sacra* (1645), *Opera*, 4:615–43. Conring returned to the subject much later in his *Exercitatio politica de majestate eiusque iuribus circa sacra et profana potissimis* (1669), *Opera*, 4:605–15. Also informative is a letter "De immortalitate animae," dated 7 October 1659, to Rabanus von Canstein, *Opera*, 6:638–9, and a letter "De pacis et concordiae ecclesiasticae desiderio," dated 19 January 1674, to Gerhard Titius, *Opera*, 6:636–8.

74 "Ast ne ad vetera provocem exempla, haec ipsa aetas nostra passim terrarum plurimas exhibet longe florentissimas respublicas, ubi citra ullum civilis concordiae dispendium magna satis obtinet religionis diversitas." *Opera*, 2:468, from the letter of dedication to the 1677 edition of the *Consultatio Catholica.*

that intensity had given rise, Conring's elimination of confessional belief from the equation was hardly without risks. That is perhaps sufficient to explain why he published his *Consultatio Catholica* under a pseudonym. But something more fundamental was at stake than merely the desire to avoid the risk of exposing his person to attack: a new understanding of belief. In Conring's eyes there was no necessary link between the quality of the person and the belief the person held. Confessional belief became an independent variable. It could be adopted, abandoned, changed, defended, and debated without any necessary danger to the integrity of persons or their participation in the commonwealth.

This was the point that Conring made, if only by implication, when he referred to Protestants as heretics while posing as a moderate Catholic theologian. The point went deeper than simply to admonish people to keep their confessional beliefs to themselves. The point was that their identity could not be drawn from their beliefs at all, whether they kept them to themselves or not. Here the treatment of religion and politics was made to depend on a boundary dividing character from belief that no mere human being could ever cross. The link between confession and politics was broken.

This was a radical position. It rested on the conviction that, as a matter of principle, human beings are not fully in charge of their identity. The mask was no exception, donned merely on certain dangerous occasions to hide what otherwise would have been plain to see; it was the rule and what it hid was never seen, not even by the person wearing it. As Hobbes was going to explain in his *Leviathan*, without a mask there could not even be a person. Religious diversity was therefore not an option; it was part of the very nature of political communities.

Conring thus stands for principles that we identify with the Enlightenment. He turned confessional belief into a matter of opinion and opened the way to modern politics. He spoke explicitly about the light of truth, the darkness religious passions cast on the mind, and the clarity with which the mind's eye can perceive the truth as soon as passions have been dispelled by reason. "Once affects no longer cloud the mind's eye, it will see clearly the sunlight of the truth, on which our vices now cast darkness . . . ."[75] He praised gentle speech as the best teacher. He placed his trust in science and focused his criticism on superstition.

And yet it would be a profound misunderstanding to characterize Conring as a secular intellectual. The enlightenment for which he called arose directly

75 "Imo fiet, ut affectuum purus mentis oculus clare perspiciat caligantem nunc vitio nostro veritatis solem . . . ." *Opera*, 1:127.

from the desire to contain religious violence. That shaped its character. Neither the violence nor its religious motivation would simply disappear. Instead they {341 | 342} were translated into a modern idiom designed to remove them from contention without at all forsaking their religious core. Henceforth society would be devoted to the pursuit of justice, truth, and reason; henceforth people were going to be free to hold whatever religious views they liked. But people could never be allowed to hold the view that their identity as members of the political community depended on their religious views. That was something quite different from just one other kind of permissible confessional belief. That would have undermined the order that Conring hoped to bring about and threatened the very reason of the Enlightenment with madness and insanity. That was, in short, the modern equivalent of heresy.

One may of course legitimately wonder what to call the belief that religious belief can vary independently of a person's ability to play a constructive role in the political community. One may call it secular on the grounds that it separates politics from religion, particularly confessional religion as practiced in early modern times. One may also call it religious on the grounds that it constitutes a first principle of social order that can neither be deduced from reason nor proven by empirical observation; the same goes for its opposite. But however such a belief ought to be classified, Conring was very clear about the target against which it was directed: "mindless superstition" (*inanis superstitio*) particularly if it took forms approaching "the furors of Jewish zealots" (*furores Judaicorum zelotarum*).[76]

It should therefore come as no surprise that Conring regarded the pursuit of science and political unity as matters commanded by Christian faith itself. He did not hesitate to draw on St. Vincent of Lérins's classic definition of the Catholic faith in order to define exactly what he had in mind when he spoke of the sunlight of the truth:

> Once affects no longer cloud the mind's eye, it will see clearly the sunlight of the truth, on which our vices now cast darkness, so that all of us shall embrace that which is truly Catholic, that is, what has been believed everywhere, always, and by all.[77]

76 See above, p. 434 and n. 67.

77 "Imo fiet, ut affectuum purus mentis oculus clare perspiciat caligantem nunc vitio nostro veritatis solem, utque omnes id amplectentes quod vere καθολικόν est, h.e., quod ubique, quod semper, quod ab omnibus est creditum." *Opera*, 1:127. Cf. Vincent of Lérins, "Duo Commonitoria," *PL* 50:640: "In ipsa item Catholica Ecclesia magnopere curandum est ut id teneamus quod ubique, quod semper, quod ab omnibus creditum est. Hoc est etenim

The scientific truth that Conring advocated was Christian to its very core. His reliance on the ancient fathers of the church was more than antiquarian. He insisted that science was joined to Christian virtue. {342 | 343}

> Religious zeal is bitter and lacks science. I mean the kind of science that is first of all chaste, then peaceful, equitable, obedient, full of mercy and good fruits, without deceit and not in the least bit insincere. We pursue the truth, but we mature with charity. That kind of science constrains anger. It is kind. It does no wrong, it is not puffed up, it does nothing dishonorable, it does not seek its own advantage, it does not get irritable, does not contemplate evil, has trust in everything, has hope for everything, and sustains everything.[78]

Science went into battle against religious superstition. But the difference between science and superstition was not at all that only superstition drew on oracles. Both drew on oracles and both claimed religion in support. The difference was that only the "oracles of prudence" (*prudentiae oracula*) spoke the truth. The truth was that no human being was qualified to judge, because each human being wore a mask that hid one's true identity from all but God. Whoever denied that truth, maintaining that human beings were defined by their confessional belief, was afflicted by a terrible disease, blind to the light of reason, inciting religious war and Jewish zealotry. Victims of that disease had lost the means to yield voluntarily to reason. They deserved, for their own good and that of the community, to be gently restrained.

There is therefore a darker side to Conring's vision. Conring explicitly held out the hope for restoring Germany to a fully Christian form of unity, and explicitly opposed it to the example of the Jews:

> What if sweet speech were to bear such fruit that Rehoboam and Jeroboam, Juda and Israel, Jerusalem and Samaria would exist no longer in our midst? What if the wall between us were to come down and we, who have the same blood and share the same commonwealth, were to

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vere proprieque catholicum, quod ipsa vis nominis ratioque declarat, quae omnia fere universaliter comprehendit."

78 "Zelus iste zelus amarus est, et carens scientia: illa saltem, *quae primum quidem casta est, deinde pacifica, aequa, obsequens, plena misericordia et fructuum bonorum, absque disceptatione et minime simulata. Veritatem sectemur, sed adolescamus prorsus cum charitate.* Illa vero *iram cohibet, benigna est, non agit perperam, non inflatur, non agit indecore, non quaerit quae sua sunt, non exacerbatur, non cogitat malum, omnia credit, omnia sperat, omnia sustinet.*" *Opera*, 1:126. Cf. James 3:16–17, 1 Cor. 13:4–7.

> have the same Christ as well, and the wounds that our disputes have inflicted on his body were to heal, and his tunic, which even military furor was once ashamed to rend, but which we have torn into innumerable pieces, were to be repaired? . . . For since the church is the soul of the commonwealth, the commonwealth can be said to be contained in the church with no less truth than it was once denied by Optatus of Milevis in another sense.[79] {343 | 344}

Surely the form of science and Christianity to which Conring subscribed was novel. No doubt the disassociation of religious belief from political life helped put an end to religious war and made way for the creation of political communities that no longer needed to define themselves in terms of Christian confessions and that were even capable of promoting, or at least permitting, the integration of the Jews. Yet none of that eliminated religious passion from those battles with superstition into which the oracles of prudence led the modern state, much less religious tension between Christians and Jews.

In sum, the preface to Aristotle's *Politics* that Conring wrote in 1637 shows nothing more clearly than the logic by which the desire to restore the unity and power of Germany from the great damage it had suffered from religiously motivated violence resulted in the translation of an old form of religion into a modern one. The old form was confessional Christianity; the modern was the worship of science, reason, and the state. What that modern religion required its adherents to believe remained uncertain for some time to come. But that should be no reason to blind us to the ambiguous relationship that it established between truth and power. Conring's insistence on freeing the person from a politically debilitating identification with confessional belief was liberating for the moment. But it offered no guarantee that the justice of that liberation would never be used to sanction the exercise of force in ways possibly more unfettered, and therefore more tyrannical, than force used explicitly in the name of Christ.

This goes some way towards explaining the conflicting judgments about Conring's religious views. Erik Wolf is entirely right to observe that Conring no

79 "Quid, si et in nobis dulcis sermo istum fructum pariat? Ne videlicet amplius et in nobis sit Roboam et Jerobeam, Juda et Israel, Hierosolyma et Samaria; sed intergerino pariete confracto, qui unius sanguinis uniusque simus reipublicae etiam unius simus Christi, coalescentibus vulneribus, quae ejus corpori dissidia nostra inflixerunt, et reparata ejus tunica quam militaris furor olim scindere erubuit quidem, nos autem innumeras in partes divisimus. . . . quippe quum anima quasi reipublicae sit Ecclesia, adeoque non minus vere dicit possit, rempublicam in Ecclesia esse quam vere id olim alio sensu negavit Optatus Milevitanus." *Opera*, 1:127.

longer shared the religious commitments of preceding generations. But he is thoroughly mistaken in concluding that Conring had no genuinely religious commitments at all. They just happened to be commitments of a different kind. Inge Mager is equally right to point out that Conring's religious commitments need to be taken seriously. But she misses the mark when she says that Conring lacked a theological *Gesamtposition*. Not to have such a position *was* Conring's position. Stolleis, it seems to me, has it exactly right: Conring's pursuit of science is impossible to understand apart from his ideas about God, nature, and theology. Precisely how Conring's confessional writings helped to promote the new combination of science and politics with Christianity remains to be investigated in detail. But that they did so by placing a religious sanction on the line dividing confessional belief from science and politics should now, I hope, be clear.

In retrospect, perhaps the most intriguing historical detail about the preface to Aristotle's *Politics* may well consist of the princes to whom Conring dedicated it over the course of its career. In 1637 he dedicated the original to Duke William of Brunswick-Lüneburg. In 1654 he republished it in his book on the boundaries of the German Empire and dedicated it to the Great {344 | 345} Elector Frederick William of Brandenburg.[80] In 1677, four years before he died, he included it in his revised edition of the *Consultatio Catholica* and dedicated it to Frederick, son of the Great Elector and future King Frederick I of Prussia.[81] He made a point of repeating his worries about the unity of Germany, and expressed the high hopes he placed on the rulers of Brandenburg because of their exemplary ability to maintain political unity while allowing for religious diversity.[82] In and of themselves, those dedications can hardly bear the weight of much historical interpretation. But seen in the right light, they point directly to the conjunction of science with religious toleration and the rise of the modern state that used to shape European history and may, for better or for worse, not yet have lost its power.

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80 Conring, *De finibus imperii Germanici* (1654), pp. 3–6 of the unpaginated front matter; reprinted in *Opera*, 6:373; cf. Goebel's remarks in *Opera*, 1:vii–viii.

81 *De pace civili* (1577 [i.e., 1677]), pp. 3–10 of the unpaginated front matter; reprinted in *Opera*, 2:468–9.

82 *Opera*, 2:468.

CHAPTER 14

Hermann Conring and the European History of Law

Hermann Conring has sometimes been described as "the founder of German legal history." In a superficial sense, that description has some merit. But at a deeper level it betrays a fundamental misunderstanding of the historical relationship between the modern study of legal history and the medieval interpretation of Roman law. The purpose of this essay is to clarify that relationship by focusing on Hermann Conring's case as a particularly telling instance of a more general phenomenon. I will proceed in three steps. First, I will outline the history of law in medieval and early modern Europe; second, I will examine the development of legal history; and third, I will describe Hermann Conring as the modern legatee of a tradition deeply embedded in the long course of European history.

The subject of this paper is the place of Hermann Conring in the history of European law. In order to make sense of this subject, three different matters need to be considered: one is the history of the law that governed Europe during the Middle Ages and the so-called early modern period; the second is the development of legal history; and third, of course, is Hermann Conring himself. I shall deal with each of these in turn.

Let me clarify what I mean by 'law,' 'history of law,' and 'legal history.' Law is often defined in relatively narrow terms as the sort of thing aspiring lawyers learn in schools of law. On that understanding law is distinct from custom, manners, ceremonial rules, social conventions, habits of spiritual worship, and so on. Defining law that way is useful because of the special role that formally enacted laws play in the modern world—a world in which church and state are sharply divided, where laws are generally kept distinct from morals, and custom lacks obligatory force while professional lawyers play a crucial and expanding role. But it can be confusing for earlier periods of history, when law was not so sharply distinguished from other kinds of norms. I shall therefore use 'law' as a generic term for all of the rules and regulations by which the members of

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a given society distinguish between right and wrong in order to maintain a certain kind of order and settle their disputes without having to take recourse to unregulated violence. In principle {113 | 114} it makes no difference whether those rules and regulations consist of unwritten customs, mores, manners, spiritual beliefs, ecclesiastical canons, or formally enacted statutes. What matters is only whether or not their violation threatens the social order. If it does, they qualify as 'law' as I shall mean it here. It does especially not matter whether they happen to have been written down or not. What is important is only that they are known and can be verified. They may be known from writing and verified by going to the library, but they may also be known from memory and verified by means of turning to elders and experts who know the ways of society from long experience and memory.[1]

Let me also distinguish between two different uses of the term 'history of law.' One concerns the history of the law as it happened. 'History of law' in this sense refers to changes that occurred in law over time. The other concerns the knowledge people have of those changes. 'History of law' in *this* sense refers, neither to the law nor to the changes undergone by law over the course of time, but to a special form of knowledge *about* law and its changes that is usually academic and founded on an examination of the surviving evidence. In the first sense history of law consists of changes in the rules and regulations by which people organize their lives; it is something that happens to the law. In the second sense history of law consists of the study of those changes; it is something done by people with a special interest in the legal past. These are, of course, two very different things. Using the same expression for both is unnecessarily confusing. I shall therefore use the term 'history of law' to refer to the changes that happened to law over the course of time, and 'legal history' to refer to the study of those changes. {114 | 115}

1 The History of European Law

The most important point to make about the law that governed medieval and early modern Europe from about 1000 CE until about 1600 CE, and in some ways longer than that, is this: there were two very different types of law that

1 For contrasting approaches to the study of law in Europe see H. Kantorowicz, *Definition of Law*; Hart, *Concept of Law*; Dawson, *Oracles of the Law*; Gierke, *Das deutsche Genossenschaftsrecht*; O. Brunner, *Land and Lordship*; Bossy, ed., *Disputes and Settlements*; and S. Roberts, *Order and Dispute*.

operated on two very different levels. One was practiced on the ground in towns and villages; the other was studied in universities.[2]

It would be tempting—and it is not at all uncommon—to call the former the actual legal practice of medieval Europe and the latter a kind of legal theory. But it would also be misleading. Academic law and local law were not related to each other as theory is related to practice, but rather as two different kinds of practice are related to each other. Each was a practice of sorts, although the sorts were different. Each also had its own theoretical dimension and the theories differed as sharply from each other as did the practices. Local law governed the lives of people far more directly than university law, but its theoretical dimension was not well developed. University law was only practiced in rather special circumstances—at least in the beginning—but it did have a very well developed body of theory. Eventually that gave university law a decisive advantage. It is not nearly as clear as one might {115 | 116} think why that should have been the case. But the theoretical power of university law clearly proved to be so great an attraction that over time it spread and managed to transform or displace the local law.[3]

Let me be more specific. The law according to which most people actually organized their relations with each other during the period in question differed widely from place to place and time to time. In Southern Europe it was more often written, so that it was available for consultation and subject to formal procedures of reconsideration, repeal, amendment, and so on. This is one of the legacies of ancient Rome. Though the Roman Empire had lost political control over the western parts of Europe during the early Middle Ages, the legal practices that it had put into effect did not necessarily require the support

2 For solid overviews of European legal history as a whole, see Hattenhauer, *Europäische Rechtsgeschichte*; Bellomo, *Common Legal Past*; Wieacker, *History of Private Law*; Robinson, Fergus, and Gordon, *European Legal History*; Berman, *Law and Revolution*; and Berman, *Law and Revolution II*. These may be supplemented by legal histories focusing on particular nations or particular kinds of law, such as Conrad, *Deutsche Rechtsgeschichte*; Olivier-Martin, *Histoire du droit français*; Leicht, *Storia del diritto privato*; Leicht, *Storia del diritto pubblico*; J. H. Baker, *Introduction to English Legal History*; Nicholas, *Introduction to Roman Law*; Koschaker, *Europa und das Römische Recht*; and Feine, *Kirchliche Rechtsgeschichte*. For detailed bibliographical information, the single best source is Coing, ed., *Handbuch der Quellen und Literatur*.

3 In one way or another, the contrast between local and university law features in virtually all accounts of medieval European law. For a cogent exposition see Bellomo, *Common Legal Past*, 55–111, who refers to local law as *ius proprium* and to university law as *ius commune*. For other perspectives on this issue see, e.g., Genzmer, *Mittelalterliches Rechtsdenken*; Cortese, *La norma giuridica*; Costa, *Iurisdictio*; Koschaker, *Europa und das Römische Recht*; and Gagnér, *Studien zur Ideengeschichte*.

of central government in order to survive. Of course the various so-called barbaric tribes that moved into the formerly Roman territories from the third to the sixth centuries and arrogated the exercise of political power to themselves brought their own legal customs. But they still lived side by side with people who had long been accustomed to the law of the Roman Empire. They often allowed them to keep that law and they were not averse to modifying their own customs during the centuries that followed in light of Roman practices. Some of them were even proud to live by Roman law. Thus medieval Southern Europe came to be covered by a patchwork of different legal regimes commonly grouped together under the somewhat condescending heading of Roman vulgar law. But there was never any guarantee that a particular decision concerning a particular issue in a particular place—about property, for example, or liberty, or responsibility for crimes, or inheritance—would be made the same way in other places. There is no way to write a book about the law of medieval Southern Europe without dividing it into as many chapters as there were different legal localities.[4] {116 | 117}

A similar patchwork covered Northern Europe, but with this difference: it had not been affected by Roman law to anywhere near the same degree, and at first almost none of it was written. Here, too, there was much greater variance in legal practice than it is easy to imagine for inhabitants of the modern world, used, as they are, to the coherent legal regimes furnished by modern nation states. Salian Franks, Ripuarian Franks, Bretons, Alemans, Bavarians, Saxons, Angles, Thuringians, Northmen, Danes, Swedes, Wends, Poles, and the rest all had their own ideas of proper social order. Since few of their ideas were written down, the varieties of Northern European law are still more difficult to ascertain than is the case for Southern Europe. But that does not in any sense reduce their quality as law.[5]

Medieval Europe can therefore with some justice be divided into two legal regions: one southern, where Roman traditions were relatively strong, and one northern, where they were not. But local variations were far more important than the broad division into southern and northern, Roman and Germanic. The customs of northern European Germanic tribes were not unaffected by Roman habits, and the reverse is true as well. The clergy played a particularly important role in guaranteeing a minimum of legal harmony across the whole

4 Conrat, *Geschichte der Quellen und Literatur*; Levy, *West Roman Vulgar Law*; Liebs, *Jurisprudenz im spätantiken Italien*; Chevrier and Pieri, *Loi romaine des Burgondes*; Gaudemet, *Bréviaire d'Alaric*; Collins, *Law, Culture, and Regionalism*.

5 Wormald, *Legal Culture*; Davies and Fouracre, eds., *Settlement of Disputes*; Köbler, *Recht im frühen Mittelalter*; Amira, *Germanisches Recht*.

extent of Latin Christianity. They furnished the single most important means by which Roman law came to reshape local law in its own image. Long before the first universities were founded in the eleventh and twelfth centuries, the clergy had led the advance of Roman law by converting northern European pagans to Christianity. Conversion did not merely mean adopting a new faith, a new calendar, and a new liturgy. It also meant accepting a new kind of authority and some rather fundamental changes in the law the new authority required. Among the most important were rules concerning birth, death, and marriage, which is {117 | 118} to say, the most important occasions on which property changed hands in a society in which buying and selling had none of the significance for property exchange they have today while legitimate birth was an essential precondition for success.

Europe thus did not, as it were, fall into two sharply demarcated blocks of different legal practice. It rather fell into one huge mosaic, made up of tiny pieces, much smaller than most modern states, with infinite variegations ranging in many different shades and hues from Roman and written at one extreme to Germanic and unwritten at the other, with neither extreme ever existing anywhere in complete and unadulterated purity, such that the legal differences between one southern locality and another may well have outweighed the global difference between South and North.

So much for local law. University law presented an entirely different picture. On the one hand, it was more or less the same all over Europe. But on the other hand, it did not even exist until the first universities were founded in the eleventh and twelfth centuries. It was invented more or less from scratch when some curious and gifted northern Italian intellectuals began to read and systematically study the single manuscript of the *Digest of Justinian* that still survived in Western Europe.

The *Digest* was the largest and by far the most important of the four volumes of laws and jurisprudence collectively known as the *Corpus iuris*—the other three being the *Code, Institutes*, and *Novels*—that had been compiled mostly from older sources and published in the sixth century CE at the command of Emperor Justinian. The *Digest* embodied much of the legal wisdom of ancient Rome, albeit in a classicizing form that stood at a remove from legal practice even at the very time when it was being codified. In the Byzantine East, it was soon modified or superseded by new imperial legislation. In the European West it fell pretty much into oblivion—and if that single manuscript of the *Digest* had not by chance survived, the *Corpus iuris* might never have been resuscitated at all. Yet that manuscript did survive, and it served as the focus of an extraordinary explosion of intellectual activity that, together with the study of canon law, occupied one of the three higher faculties into which European

universities were normally divided (the other two being theology and medicine, the lower one being philosophy).[6] {118 | 119}

The study of Roman law thus began as a purely academic enterprise in faculties of law, entirely distinct from local legal practice.[7] It was conducted by intellectuals enamored of the *Corpus iuris*, seduced, almost, by what seemed to them a form of reason transcending mere human creativity. They thought the *Corpus iuris* embodied legal reason itself, and they regarded its interpretation as a sacred responsibility. Of course there always were connections between the study of Roman law at the universities and actual legal practice. Some of those connections were rooted in the plain fact that some local legal habits had a history that went back to ancient Rome and were accordingly, and unsurprisingly, somehow related to the laws contained in the *Corpus iuris*. Others arose from the fact that professors of Roman law were admired and increasingly consulted on questions of law, so that university law began to have effects outside the universities. Still more ran through the close relationship between Roman law and canon law.[8] Not least, all over Southern Europe there were notaries public who played a crucial role by keeping official registers of documents and whose job required them to have some knowledge of Roman law. But no place in Europe was actually governed by the *Corpus iuris*. At heart, the study of Roman law existed in an intellectual universe entirely its own.[9] {119 | 120}

One of the most important trends in the history of European law—if not the most important one—consists of the way in which the difference between local law and university law was gradually resolved. Speaking broadly, it was

6 Kuttner, "Revival of Jurisprudence"; Engelmann, *Wiedergeburt der Rechtskultur*; Berman, *Law and Revolution*; Bellomo, *Common Legal Past*; Vinogradoff, *Roman Law*; Brundage, *Medieval Canon Law*.

7 Bellomo, *Common Legal Past*, 61, makes this point with special clarity: "Irnerius was not a jurist acting as a custodian for normative texts that he was lucky enough to have available and perhaps to own; he was a master of the liberal arts who made himself into a jurist in order to shatter the status of tradition, because tradition brought distortion and confusion."

8 It is worth noting that both Pope Clement V (1305–14) and Pope John XXII (1316–34) taught Roman law before they rose to high ecclesiastical office. For an informative scholarly exchange on the relationship between the church and Roman law see Ullmann, "Honorius III," and Kuttner, "Papst Honorius III."

9 The kingdom of Naples furnishes a particularly striking illustration. Law professors at the University of Naples were expected to teach Roman law, but did not teach the law that actually obtained in the kingdom of Naples (or Sicily), the so-called *Constitutions of Melfi* or *Liber Augustalis*. Yet the *Constitutions of Melfi* and the University of Naples were the work of one and the same Emperor Frederick II, the former promulgated in 1231, the latter established in 1224; see Bellomo, *Common Legal Past*, 93–5.

resolved in favor of university law. The speed and the depth of the changes that were wrought in legal practice as a result differed considerably across the various regions of Europe. In Southern Europe, there was a larger percentage of urban and literate laity than in Northern Europe, and the difference between local law and university law was smaller to begin with, both in terms of language and in terms of historical origins. Hence, in Italy, the laity played a more prominent role in bringing local law into conformity with university law, and reached the goal more quickly. In Italy, the laity was able to produce a quasi-professional class of experts trained in legal matters from very early on. In Northern Europe no such class existed until much later. In Northern Europe the lead was taken by university-trained clerics who were employed as secretaries, councilors, and diplomats, first by ecclesiastical governments, but then increasingly often by temporal governments as well. In those capacities they spread what they had learned in the universities to settings far removed from questions of faith or prohibited degrees of marriage.

Regional variations persist even today, not only between nations, but also within nations—and never mind the addition of a grand new level of legal conformity in the body of laws that issue from the European Union. But the scope of the differences was reduced and enough agreement was reached on points of legal substance and procedure to result in a common understanding of the law that was rooted in the study of the Roman law. By the late thirteenth and early fourteenth centuries experts trained in Roman law played a crucial role in helping King Philip IV of France to govern his state.[10] By the later Middle Ages the governments of German princes and towns, particularly in the Southwest of Germany, increasingly relied on the services of officials who {120 | 121} had studied Roman law in order to "reform" their legal procedures.[11] In 1495 Roman law was officially "received" in Germany and the *Reichskammergericht*, a kind of newly established Supreme Court for the entire Holy Roman Empire that was required to follow Roman law.[12] It came to be taken for granted everywhere that law ought to be written, codified, formally enacted by the proper authorities, promulgated, known to those to whom it applied, coherent, subject to revision and repeal, adjudicated in courts with clearly identified responsibilities, allowing for appeal to higher courts against contested judgments, following definite rules of proof and evidence, consistently enforced and equally applied to all—and it was almost entirely forgotten that every

10 Strayer, *Gens de justice*; Pegues, *Lawyers of the Last Capetians*; Gouron, *Etudes*.

11 Genzmer, "Kleriker als Berufsjuristen"; Stelling-Michaud, *L'université de Bologne*; Trusen, *Anfänge des gelehrten Rechts*.

12 Coing, *Römisches Recht in Deutschland*; Smend, *Reichskammergericht*; Ranieri, *Recht und Gesellschaft*.

single aspect of this understanding of the law conflicted with the local law of medieval Europe.

Thus Europe gradually acquired a common legal culture. It is worth noting that this culture includes not only the Continent, but also England.[13] English common law differs, of course, in basic ways from continental European law. The most obvious differences are that common law does not originate in Roman law but in the legal customs of medieval England, that English law therefore has concepts (such as seisin) and procedures (such as writs) quite different from those found in continental law, and that England developed a class of professional jurists trained at Inns of Court, and not at universities. Thus England presents a special case. But England experienced the same conflict between local law and university law as the rest of Europe did, and may well have experienced it particularly sharply. It merely solved the {121 | 122} conflict differently: not by following the lead of the universities and university-trained literati; not by adopting Roman law and weeding out local practices; but by doing the opposite, turning local law into a body of coherent jurisprudence with the same function as Roman law had on the Continent and leaving Roman law where it had started, in universities.

England and Italy thus are the two European countries in which the conflict between local law and university law was most effectively resolved: in Italy, because the two were closely enough related to each other that it proved relatively easy to make the former cohere with the latter; in England, because Roman law was not applied directly, but taken as a model. The homegrown practice was equipped, not only with a homegrown theory, but also with a homegrown class of jurists. It may not be far wrong to say that in this way the English followed the spirit of ancient Roman law more closely than any other European nation.[14]

2 European Legal History

Let this suffice for a brief sketch of the history of European law. Now let me turn to the development of legal history. Every known society of human beings, no matter how small or large, how ancient or recent, how simple or how complex, has rules and regulations by which it organizes its affairs. Over time those rules change. Thus law has a history at every moment in the history of Europe,

13 On England see the classic by Pollock and Maitland, *History of English Law*; the standard by J. H. Baker, *Introduction to English Legal History*; Wormald, *Making of English Law*; and Helmholz, *Roman Canon Law*.

14 Stein, *Roman Law and English Jurisprudence*; Watson, *Spirit of Roman Law*.

just as it does at every moment in the history of any other society. Not so for legal history. Legal history is a recent invention, a rarity among the forms of knowledge human beings have produced since they began to think.

Certainly no such thing as legal history existed when Irnerius (or Werner, ca. 1055–ca. 1130) inaugurated the study of Roman law in Bologna. That does not of course mean that Irnerius had no knowledge of changes that affect law over time. He most certainly did. In fact, such knowledge was precisely the foundation on which he turned to the study of Justinian's *Digest*. He knew that the *Digest* had been forgotten, and he sought to renew attention to its teaching. But his was not the {122 | 123} kind of knowledge taught by legal history. So far from studying change as something worth knowing in its own right, as legal historians do, Irnerius and his followers wished to restore Roman law to the place of honor they believed it ought to occupy by right. They viewed change as a form of corruption and abuse, of deviations from a proper norm.[15] They thought that in the *Digest* they had discovered the golden truth of law. They sought to grasp that truth as best they could in order to share it with their fellows and let it be their guide in furnishing justice to their society.

Nothing surprising about that. Surprising was something else, namely, that the golden truth Irnerius found in the *Digest* conflicted with local law. What was unusual was that medieval Europe revered a body of law in its universities that was practiced only in very special circumstances and everywhere else—at least outside the church—practiced a law that differed from the law that it revered. The distance between the legal truths embodied in the *Digest* and those put into practical effect in legal transactions day in, day out all over Europe created a kind of cognitive dissonance. That dissonance prepared the field for legal history. It opened a door through which knowledge of change could enter. It seems unlikely that legal history could have developed otherwise.

Let me mention the stages by which the possibility became reality. At first the dissonance was weak because the conflict was scarcely perceived. This was in part because there was, as yet, no systematic knowledge of the different practices prevailing in different areas of Europe. It was as well because those different legal practices could be dismissed as mere aberrations from the norm. But above all it was because the *Corpus iuris* itself first needed to be mastered. It took two centuries and a whole school of jurists commonly known as the

15 For the lack of any historical dimension in the thought of the glossators and canonists see, e.g., Bellomo, *Common Legal Past*, 65–6, 68. For a classic exposition of this theme see Kern, "Recht und Verfassung." For similar accounts see Kern, *Kingship and Law*; Tellenbach, *Church, State, and Christian Society*; and O. Brunner, *Land and Lordship*.

glossators before there was anything like an agreed-upon interpretation of Roman law.[16] {123 | 124}

Once that work was finished, the conflict became more difficult to ignore. By the middle of the thirteenth century there was a standard set of glosses compiled by Accursius (ca. 1182–1260) and known as the ordinary gloss. By the late thirteenth century local law itself had been so thoroughly described and codified by experts and regional legislators like Ranulf de Glanville (1130–90) and Henry de Bracton (d. 1268) in England, Philippe de Beaumanoir (ca. 1250–96) in France, King Alfonso the Wise (1221–84) in Spain, and Eike von Repgow (ca. 1180–ca. 1233) in Saxony as to leave little doubt about the disparities, not only between each of them, but also between all of them and Roman law.

The first attempt to resolve the conflict was made by the so-called commentators. The commentators rose to prominence in the fourteenth century. They are called commentators because their writings did not consist of line-by-line glosses, but of longer and more discursive "commentaries" in which they sought to adapt the meaning of Roman law to the realities of medieval social and political life. They relied heavily on logical distinctions in order to find common ground between local and university law. Their most famous representative was Bartolus of Sassoferrato (1313/14–1357). Hence they were sometimes called "Bartolists." Since their method arose in Italian schools, it is often called "the Italian manner," *mos italicus*, of interpreting the law. Their work was so successful that it dominated legal practice well into the sixteenth century.[17] But it came at a price. The price was that Roman law needed to be explicitly adapted to purposes and circumstances that it had never been meant to serve—and the adaptation showed.

By the fifteenth century it was too late for adaptation. Or more precisely, by the fifteenth century those who knew the law the best {124 | 125} and who had done the most to persuade themselves and others that the apparent conflicts between the laws could be resolved by logical analysis were no longer able to believe their own conclusions. The chains of reasoning became too long and then they snapped. The point at which they snapped is the point at which legal humanists invented legal history. Legal humanism originated in Italy in the fifteenth century, but its most prominent advocates were French or Italians who taught in France. Hence legal humanism is commonly distinguished from the "Italian manner" as the "French manner," *mos gallicus*. Among the best

16 On the glossators see Genzmer, "Die iustinianische Kodifikation"; H. Kantorowicz, *Studies in the Glossators*; Gualazzini, *L'insegnamento del diritto*; and for an incisive account of a major issue Calasso, *I glossatori*.

17 Riccobono, "*Mos italicus* e *mos gallicus*"; Holthöfer, "Literaturtypen des mos italicus"; Kelley, "Civil Science Italian Style"; Troje, *Humanistische Jurisprudenz*.

known legal humanists are Lorenzo Valla (1406–57), Guillaume Budé (1468–1540), Andrea Alciato (1492–1550), and Jacques Cujas (1522–90).[18]

Legal humanists broke sharply with the glossators and the commentators. From their point of view, Roman law was simply the law of an ancient people—admittedly an ancient people of particular importance, but nonetheless essentially no different from any other ancient or, for that matter, contemporary people. They recognized full well that there were deep historical connections between ancient Rome and their own society. But they were also certain that the differences were so fundamental as to require a very different approach to Roman law. They did not believe Roman law could be regarded as valid in the contemporary world without significant adjustments. From their point of view, the logical distinctions drawn by glossators and commentators concealed a fundamental ignorance of the real meaning of Roman law. They thought its meaning depended on the specific conditions that had obtained during antiquity and that had disappeared since then. Hence they set about studying the history of ancient Rome and Roman law, and the discoveries they made led them to reject some of the most fundamental convictions upheld by glossators and commentators.

Legal history thus made it possible to account in a convincing way for a tension that threatened to undermine all faith in law by leaving lawyers no alternative but to choose between different kinds of law as they pleased—a choice that was by definition impossible to justify by {125 | 126} law, since law was just what was at issue.[19] Legal history pointed a way out of that dilemma. Legal history made it possible to acknowledge that the conflict between university law and local law was real. But it offered a reason why they conflicted and a new way of explaining their relationship. The reason was change over time and the way of explaining it was history. Some laws were old and some were new. Each law was valid in its own time and place—but *only* in its own time and place. Roman law was law in the full sense of the term. But it was ancient law. The law that lawyers practiced was modern and valid for the present time.

Thus legal humanists adopted change over time as one of the most basic criteria required to understand the meaning of the law. Needless to say, this could not happen without a great deal of upheaval and uncertainty. The yardstick of legal respectability that had been used so far suddenly lost credibility. The playing field was leveled. Roman law no longer stood head and shoulders above the rest, as though it alone deserved to be regarded as *ratio scripta*,

18 Maffei, *Inizi dell' umanesimo giuridico*; Kisch, *Erasmus und die Jurisprudenz*; Kelley, *Foundations*; Kelley, "Civil Science in the French Manner."

19 For a beautiful illustration of the cynicism that could be inspired by that choice see Scala, "Dialogue on Laws and Judgments."

reason in writing. It was reduced to the more humble status of just one set of laws among many, especially important to be sure, for many different reasons, but mostly for reasons that were themselves historical, and not the special sanctity with which Roman law seemed to have been imbued before. All law, ancient as well as modern, could claim to represent reason in writing now.

The introduction of legal history thus solved one problem only at the cost of creating another. The problem that it solved was how to account for the difference between the laws taught at the universities and those practiced in Europe on the ground. The problem that it created was how to prevent the law from changing with every passing moment. How could the knowledge that law had a history be stopped from turning law into mere opinion?

The answer to that question came in the form of the doctrine of sovereignty as first developed by Jean Bodin, not coincidentally a lawyer well-trained in the methods of both the *mos italicus* and the *mos gallicus*, and keenly aware of the need to find some means with which to resupply the laws that had now been subjected to the winds of time with {126 | 127} the obligatory force the law must have in order to fulfill its purpose. Sovereignty was that means. The sovereign was thought to stand as far outside of time as Roman law had done in medieval Europe. The sovereign was exempt from law and for that reason entitled to make law for his subjects. The matter is more complicated than can be settled here. A fuller consideration would require attention to distinctions between positive law, fundamental law, natural law, and divine law, not to mention the distinction between laws and contracts. Suffice it to say that sovereignty did manage to reendow the law with however much authority it had lost to history, and not unlikely more. That made it possible to accept the truths of legal history without having to sacrifice the legal stability that every society requires.[20]

The history of law in Europe is therefore marked by a deep irony. In one sense law never enjoyed greater respect than at the beginning of this story, the time when the conflict between the laws was at its height, for at that time the conflict was not perceived as such. As time went on, the conflict was reduced. Through canon law, the clergy, and an increasingly well-trained laity, university law spread its effects. The differences between the legal regions into which Europe might otherwise have been divided were covered by a web of common Romano-canonical jurisprudence, and as the web grew thicker the conflict between the laws was smoothed out. Thanks largely to the work of the commentators, a common European legal culture came into existence above the

20 On sovereignty in general see Hinsley, *Sovereignty*. Engster, *Divine Sovereignty*, stresses the sovereign's aspirations to the realm of the eternal. On Bodin see Franklin, *Jean Bodin and Absolutist Theory*; Quaglioni, *Limiti della sovranità*; and Zarka, ed., *Jean Bodin*.

local varieties, and it was recognized as such. There cannot be many examples in the history of the world in which an academic enterprise that started with the study of a single manuscript played so obvious and easily identifiable a role in shaping the destiny of an entire continent.

Yet to the same degree that the jurists succeeded, they destroyed the foundations of their success. As they clarified Roman law and spread their teaching far and wide, they revealed the extent to which Roman law differed from legal practice on the ground. That cast growing doubt on the authority of law. In the end, they had to stop claiming {127 | 128} that their knowledge of Roman law was identical to knowledge of the law as such and were compelled to turn themselves from practicing jurisconsults into historians of law, surrender their authority to sovereigns who legislated new laws as they saw fit, and make room for lawyers who applied a law that was no longer Roman.[21]

3 Hermann Conring

Hermann Conring was born in 1606 in the East Frisian town of Norden, close to the North Sea. He spent most of his adult life as a professor of medicine and politics at the University of Helmstedt, at the time one of the leading universities in Northern Europe.[22] He died in 1681, widely respected as one of the leading intellectuals in Germany. He is best remembered for his contributions to the study of politics, history, and law. He has therefore been called "the founder of German legal history."[23]

There is a sense in which that is a fair description: Conring played a crucial role in disentangling the history of German law from that of Roman law. He did so first and foremost in a book entitled *De origine iuris Germanici commentarius historicus* or *Historical Commentary on the Origin of German Law* that was published in 1643.[24] He made a point that may seem obvious from hindsight, but that had never been made so well before: Roman law was practiced in

21 Schnur, ed., *Rolle der Juristen*.

22 For detailed information about Conring and further bibliography see Fasolt, *Limits of History*; Stolleis, ed., *Hermann Conring* (1983); Herberger and Stolleis, *Hermann Conring* (1981).

23 Once Otto Stobbe, *Hermann Conring, der Begründer der deutschen Rechtsgeschichte* (1870), had made the designation familiar, it percolated through the literature. Equally important was E. Moeller, *Hermann Conring, der Vorkämpfer des deutschen Rechts* (1915), whose title makes the same point in a different way.

24 Conring, *De origine iuris Germanici* (1643); cf. Conring, *Ursprung des deutschen Rechts*; Luig, "Conring."

Germany because German {128 | 129} students had gone to Italian universities to study law and when they came back to Germany, they practiced the law that they had learned in Italy. That straightforwardly pragmatic explanation for the respect paid to Roman law in Germany destroyed the vestiges of the claim that Roman law was valid universally. It explained the respect for Roman law as the effect of actions taken by a specific group of people acting for reasons entirely their own. It thereby made the systematic study of German law and German legal history a conceptual possibility. That is what people mean when they refer to Conring as "founder of German legal history."

Yet there are two good reasons why it is nonetheless misleading to call Hermann Conring "founder of German legal history." One is that it focuses attention on only one of many subjects to which he made path-breaking contributions. His lectures on the states, not only of Europe, but also the rest of the world, have been regarded as among the founding documents of the systematic study of statistics. He published widely in the field of political science and edited works like Machiavelli's *Prince*, Aristotle's *Politics*, and Tacitus's *Germania*.[25] Perhaps the most original book he ever wrote (and certainly the book that took him the longest to complete and that confronted him with the greatest intellectual difficulties) was a systematic treatise on the nature of political science entitled *De civili prudentia* and published in 1662.[26] Some of his most important writings dealt with the constitution of the Holy Roman Empire and with the question of religious peace. In fact, the works collected in the six-volume edition of Conring's *Opera* that Johann Wilhelm Goebel published in Brunswick in 1730 are so variegated that the list of titles alone is enough to document how far Conring's publications went beyond the limits of legal history strictly speaking.

Moreover, Conring was trained, not as a historian at all, but as a natural philosopher and a physician. From 1626 to 1631 he studied medicine at the University of Leiden. In 1632 he was appointed professor of natural philosophy at the University of Helmstedt. In 1636 he was promoted to Doctor of Medicine and Doctor of Philosophy on {129 | 130} the same day. In 1637 he resigned from the faculty of philosophy in order to take up a chair in the faculty of medicine. He continued to hold that position until his death in 1681, supervising students, treating patients, conducting experiments, and publishing a large number of writings on medicine, including one of the earliest to endorse William Harvey's

25 Conring, ed., *Princeps* (1660); Conring, ed., *Aristotelis Politicorum libri superstites* (1656); Conring, ed., *De moribus Germanorum* (1635).

26 Conring, *De civili prudentia* (1662).

theory of the circulation of the blood, an influential introduction to the entire field of medicine, and a blistering criticism of the work of Paracelsus.[27]

Medicine has changed so much since the seventeenth century that the significance of Conring's medical writings is more difficult to reconstruct than is the case with his writings on history and politics. That may help to explain why Goebel decided not to include them in his edition of Conring's *Opera*. But if Conring is to be adequately judged, it must surely be kept in mind that his intellectual formation was that of a physician—like that of Marsiglio of Padua, Marsiglio Ficino, and John Locke—and that during the early stages of his career most of his intellectual creativity went into the study of natural philosophy and medicine. It was only in 1650 that he was formally appointed to teach politics—not history, much less law. He never joined the faculty of law and he never stopped acting as physician and professor of medicine. He was a polymath.

The other reason why it is inappropriate to call Conring "the founder of German legal history" is both more important and more difficult to explain. It consists of the place that Conring occupies in the story I have laid out for you. Roughly speaking, he may be grouped with the legal humanists and the "French manner" of interpreting Roman law. Like legal humanists, he was convinced that Roman law ought to be interpreted as a body of laws with which an ancient people had once upon a time governed themselves. Like legal humanists, he subjected the authority of Roman law to the reasons of time and thereby made room for other kinds of law to step into the place that Roman law had occupied so far. He had nothing but contempt for the glossators and commentators. Indeed, by his time the authority they had formerly enjoyed had already receded so far into the distance that Conring could afford to lampoon them without having to go into the details {130 | 131} of their analysis. It seemed self-evident to him that purely textual or logical interpretations without sound historical knowledge of antiquity could not possibly grasp the real meaning of Roman law. History and sovereignty occupied the same important place in his thought as it did in that of legal humanists. History enabled him to demolish the claims of glossators and commentators that Roman law was valid in contemporary Europe because it embodied "reason in writing," and sovereignty enabled him to insist on the freedom of each state to make laws for itself.

These principles shaped his views on Germany and German law. Few things, he thought, had done more damage to the well-being of Germany than the

27 Conring, *De sanguinis generatione* (1643); Conring, *Introductio in universam artem medicam* (1654); Conring, *De hermetica Aegyptiorum medicina* (1648); Conring, *De hermetica medicina* (1669).

confusion between Roman law and German law that had infected German minds, and the arrogance of lawyers who insisted against all better knowledge that German citizens ought to obey Roman law. From his point of view, unfounded claims like these were among the most important reasons for the Thirty Years War. The task at hand, as he defined it, was to disentangle the history of the Roman Empire from the history of the German state, investigate the history of German law from its beginnings to the present, and thereby to reconstitute the foundations of the German commonwealth. This is precisely what he did in one of his earliest published writings, the *Discursus novus de imperatore Romano-Germanico* or *New Discourse on the Roman-German Emperor*, and he returned to the same issue repeatedly later on. He gathered whatever evidence he could in libraries and archives in order to describe the laws that had actually governed German towns and regions before Roman law arrived. No one had done this before, or had at least not done it with the same clarity of conviction, the same depth of erudition, and the same pivotal success.

Those are the reasons why Conring has been called "the founder of German legal history." They are good reasons—but only if we are clear in our minds exactly what they prove. They prove that Conring created something identifiably new by continuing something very old. The founding was real, but it was not from scratch. The founding amounted to an important point of change in a continuing tradition—and the continuity matters as much as the new beginning or more. Conring stands at that point in time at which Roman law had come to be so deeply embedded in local law that the logical and institutional distinctions on which their peaceful coexistence had so far depended needed to be replaced by the historical distinctions that legal humanists introduced. That changed the place of Roman law in the organization of {131 | 132} European society. But so far from eliminating its authority, it rather enhanced that authority by translating it into the new vernacular of national legislation.

It is no accident that, in the very same book in which he used legal history to refute the notion that Roman law was binding in Germany, Conring envisaged the creation of a new code of German law. His advocacy of codification stands in the same relationship to Roman law as did his study of legal history itself. In the obvious sense it amounted to a break. There never had been a code of German law before and given that it took until the beginning of the twentieth century before a German code of civil law was actually put into effect, Conring's recommendation may be taken as evidence for his farsightedness, the difficulty of the task, and the depth of the break. But in a more fundamental sense his call for codification reflected nothing more clearly than the degree to which Roman law had taken root in Europe. It was the study of Roman law that furnished Europeans with the notion that law ought to be homogeneous for any

given people and that it ought to be set forth in codes. There had been no 'Germany' so far, much less a body of 'German law.' There had been an assemblage of many different territories and many variegated forms of law peculiar to each. The very idea that there was such a thing as German law that had a history and could be codified reflects nothing more clearly than the effects of centuries of training in Roman law. Had it not been for those effects, Conring could neither have envisioned the possibility that Germany was a sovereign state, as Rome had been, nor could he have called for Germany to have a law of its own, as Rome had had, and to define it by means of a code as Rome had done.

Henceforth, German law was going to range side by side with Roman law. It was going to have its own theory, its own practice, its own history, its own code, its own legislator, and its own jurists, as though German law and Roman law were simply different members of the same species 'law,' distinguished from each other not in kind, as theory from practice, or comprehensive code from variegated custom, or universal reason from local application, but only by the temporal circumstances of their making and the source from which they drew their obligatory force. Roman law was made in ancient Rome and drew its force from the will of ancient Roman people. German law was made in medieval and early modern Germany and drew its force from the will of German people. Apart from that, German law was now entitled to the same kind of authority as Roman law. {132 | 133}

A charming indication of the new state of affairs is the arrangement adopted by the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, one of the most venerable journals in the field of legal history. That journal is divided into three separate sections: one *Germanistisch* (devoted to German law), one *Romanistisch* (devoted to Roman law), and one *Kanonistisch* (devoted to canon law). Thus tensions that once upon a time used to beset the relationship between three different kinds of law were overtaken by a common dedication to legal history allowing *Romanisten, Germanisten*, and *Kanonisten* to coexist more or less happily on the pages of one and the same publication.

Without the turn to legal history, that kind of coexistence would have been inconceivable. It was the turn to legal history that allowed Conring to envisage German law and Roman law as different species of one and the same genus, cast German law in a new mold, and thereby to endow it with a kind of authority that had previously been strictly reserved to Roman law. Legal history, we may conclude, is nothing other than the most recent means that Europeans have devised in order to resolve the conflict between the great respect they paid to Roman law and the loyalty they felt towards the law they actually practiced. Legal history has done something other than merely to uncover the

history of law. It has cast that history in forms inherited from the study of Roman law and thereby obscured as much history of law as it revealed. Petrarch, a humanist with much knowledge of law, though not a legal humanist in the technical sense, already understood the link between the study of history and Rome. "What else, then, is all history," he asked rhetorically speaking, "if not the praise of Rome?"[28] Indeed. If Conring's work be used as evidence with which to test the truth of Petrarch's claim, Petrarch would have to be considered right. Legal history is not what it appears to be. So far from signaling an end to the effects of Roman law on European culture, Conring's devotion to German legal history offers ironic proof of Roman law's abiding significance. So far from breaking with the tradition beginning in medieval universities, Conring represents its culmination, the point at which the local law that had for so long been practiced in distinction from the law taught at the universities was finally reshaped to fit the academic model. {133 | 134}

As a result, the stimulus to critical innovation that had characterized the history of medieval law—first forcing glossators to give way to commentators, and then commentators to legal humanists—was transformed. In modern Europe it no longer took the form of a conflict between local law and university law—a conflict between two different types of law and thus internal to the sphere of law as such—but rather of a conflict pitting all forms of law against the principles that govern politics and the relations between states. In the aftermath of legal humanism and the invention of sovereignty, law was demoted from the supremacy it had enjoyed during the Middle Ages to a subordinate position and a more narrowly defined terrain, beneath the sovereign and between the states.

The line that used to divide academic jurists from local practitioners of law thus came to be redrawn in that strange modern no-man's land dividing politics from law. It now divided sovereigns, men of state, and political theorists, on the one hand, from lawyers, legal historians, and legal theorists on the other. That was a new distinction. But it was historically related to its predecessor, fulfilled similar functions, and led to similar difficulties. It arose directly out of the difference between academic law (codified, enacted, promulgated by a sovereign legislator) and local law (often unwritten, not necessarily enacted or promulgated, and highly variable over time and place). It continued the old conflict between the laws and the stimulus such conflict gave to innovation and critique, except that henceforth the innovation and critique would no longer run from academic law to local legal practice, but from politics to law. As

28 "Quid est enim aliud omnis historia quam Romana laus?" Quoted from Mommsen, "Petrarch's Conception of the 'Dark Ages'," 122 and n. 64.

Roman law had formerly served as a source of critical reflection on local legal practice, so politics would henceforth serve as a source of critical reflection on law and legislation. As glossators and commentators had once compelled local practitioners to change their ways, so men of state and theorists of politics were going to force lawyers to bow to sovereignty. The difficulties we now face in striking a proper balance between politics and law are the historical successor to the difficulties medieval people faced in trying to strike a balance between university law and local law. In that manner the memory of ancient Rome continues to confuse and challenge the world today.

PART THREE

Come and Gone: Past Sense

CHAPTER 15

Visions of Order in the Canonists and Civilians

1 Definition of the Subject

Like the other chapters in the *Handbook of European History*, this one focuses attention on Europe in space and the period from about 1400 to 1600 in time. Unlike them, it is limited to visions of order held by canonists and civilians. What precisely does or does not qualify as a vision of order may be difficult to say in specific cases, but this much is certain: visions of order are mental phenomena. They consist of thoughts about the proper way of arranging things. Who precisely does or does not qualify as a canonist or civilian is also difficult to say sometimes, but here again something is certain: canonists and civilians were living human beings. More specifically, they were people who had mastered a certain body of legal knowledge and relied upon that knowledge to lead a certain kind of life. Jurists, for short.

The following chapter is devoted to a certain type of ideas held by a certain kind of people. That raises an obvious question: What is the reason for putting people and ideas together in this way? It is assuredly not that all canonists and civilians had the same vision of order. The plural in the title of the chapter is quite intentional: canonists and civilians had many different visions of order, and sometimes they proved to be difficult, if not impossible, to reconcile. The more closely you look, the more finely differentiated varieties become discernible until the subject threatens to disintegrate in a burst of kaleidoscopic multiplicity.

Conversely, few if any of these visions were the exclusive property of canonists and civilians. They were shared by theologians, humanists, and many other people. Seeing that canonists and civilians disagreed with each other over the most basic issues, how could it have been otherwise? Perhaps more important, the ideas of canonists and civilians were shared in a limited but significant sense by everybody who had to obey canon and civil law—and during our period the number of people who did happens to have grown at an unprecedented rate.

* Originally published in *Handbook of European History, 1400–1600: Late Middle Ages, Renaissance and Reformation*, ed. Thomas A. Brady, Jr., Heiko Oberman, and James Tracy (Leiden: Brill, 1994–95), 2:31–59.

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In short, canonists and civilians did not all have the same ideas {31 | 32} about order, and the ideas they did have were not theirs alone. Hence there is nothing in the record to which one could point with confidence and say, look, there are the visions of order in the canonists and civilians. To the contrary, the more precisely you try to identify the meaning of the words in the title of this chapter, the more likely you are going to narrow your focus to a point where there is nothing left to see, or broaden it to a scope where it includes everything. That is embarrassing.

A better reason for putting ideas and people together in this way consists of what we nowadays believe has to be done in order to understand the past. Once upon a time (or so it is believed) historians divided the people of the past into a small group that had ideas and a large group that merely lived. Historians interested in ideas paid no attention to the people that merely lived, and not enough to the people who had ideas. What mattered were the ideas alone. Historians interested in people meanwhile paid no attention to ideas and only very little to the tiny minority of people who called themselves civilians and canonists. What mattered was how the majority of people lived, especially how they worked, ate, and reproduced.

Those times are changing—slowly, perhaps, and not to the same degree in France, Italy, Germany, England, the United States, and other places, but changing nonetheless. Social historians have proved to the satisfaction of most observers that people whose income stems from rents, for example, will for that reason sometimes think and act quite differently from people whose income stems from wages. Hence intellectual historians have tried to learn more about the social setting in which ideas took shape. But it is a fact as well that sometimes people think and act in certain ways for no apparent reason other than what they believe to be true and right—or fun. Hence social historians have begun to look more closely at what people thought. Their efforts have paid off handsomely. We now know more about the reasons why people thought what they did than we ever have before, and there is a burgeoning literature on what might be called the intellectual history of ordinary people, a huge, fascinating, and previously almost totally uncolonized territory. Historians seem to be tentatively moving to a consensus that what people thought and how they lived is one subject, not two.

That helps to understand the growth of interest in the history of law. Law and history used to be kept at arm's length. They were studied and practiced in different institutions by different people with different methodologies {32 | 33} and different goals. Law seemed technical, forbidding, and ahistorical to historians. History seemed shiftless and devoid of legal substance to jurists. "Today," however, as Franz Wieacker said some time ago,

> the walls between the various national schools of law, between romanists, germanists, and canonists, indeed, even those between social, cultural, and legal historians have been more thoroughly taken apart than at any time since the beginnings of modern historical research in the nineteenth century.[1]

And with good reason. There are not many other places where ideas have such immediate and obvious effects on life as they do in law, nor are there many more imposing bodies of evidence from which to learn about life in the past.[2]

In a small way the title of this chapter thus reflects a trend in contemporary historical thought. Unfortunately it reflects as well that a trend does not amount to a solution. We have already reached a point where excitement over the insights to be learned from neighboring disciplines is giving way to the recognition that our neighbors are struggling with the same problems, except that they call the problems by different names. It is good that we are abandoning the sterile kind of dualism that divides the world into ideas and things and then wonders which is more basic than the other. But in so doing we have also lost two mutually exclusive and, perhaps for that reason, successful definitions of what history was about. Now what? How exactly are we to understand the relationship between ideas and life? Is it enough to compile a list of things certain people usually considered to have been canonists and civilians happen to have said about principles of order in early modern times? Is this chapter about anything besides a trend in contemporary historical thought? Does it perhaps have no subject whatsoever?

Readers who have taken the title as a promise that they will be reading about something rather than nothing will not, I hope, be disappointed. But they should also consider themselves to have been warned that the subject is elusive. Questions like the ones just raised are difficult to answer without reconsidering the categorical division of the world into thinking things and material things of which the most familiar spokesman is René Descartes (1596–1650). There are reasons to believe that such a reconsideration may be underway, but if so, it is far from complete. Notwithstanding the enthusiasm with which alternatives are being advanced in any number of contemporary

1 Wieacker, *Privatrechtsgeschichte*, 19n18 (my translation).

2 For current thinking about the relationship between law, history, and social history see Grossi, ed., *Storia sociale*, Schnur, ed., *Rolle der Juristen*, and Bossy, ed., *Disputes and Settlements*. For the anthropological perspective see S. Roberts, *Order and Dispute*, and Allott and Woodman, eds., *People's Law*. For a quick introduction to the literature on early modern law see Rowan, *Law and Jurisprudence*. For an indication of the volume of the literature read Scupin, Scheuner, and Wyduckel, eds., *Althusius-Bibliographie*, 1:xi–xxxix, esp. xvii.

intellectual experiments, our notions of what is and what is not a subject worthy of investigation—of what does and does not constitute a decent {33 | 34} explanation—continue to rely on the Cartesian metaphysical inheritance, and it makes little difference whether they do so with or without acknowledgment.[3]

Under those circumstances it is best to proceed with caution, jump to no conclusions, and keep basic questions clearly in view. In the present context these questions are: What, if anything, united canonists and civilians? What divided them? And do their ideas about order follow any patterns?

2 Canonists and Civilians: The Common Ground

One thing obviously did unite canonists and civilians: all of them had gone to university and studied law. That may not seem like much but it is something. It meant, first of all, that they had to have an opportunity to go to university. Most of their contemporaries did not: no woman did, and the vast majority of men did not because they happened to work on a rural estate in one or another form of servitude and did not know how to read or write and were not free to leave. Few jurists came from the village, most came from the city, and all were men.

In the second place these men had to have a motive to study law. Most of those who had the opportunity did not have the motive. Members of the nobility, for example, had little reason to go to university to study anything at all. As time passed there was a growing number of exceptions. But in principle the study of law was most attractive to men who would have liked to have been noble, not for those who were—especially since a doctorate in law did in fact entitle you to consider yourself as having joined the ranks of the nobility. Something similar can be said about men in the highest levels of urban society. Their wealth was of a different sort from that of the nobility, but its presence, or the prospect of enjoying it, and the responsibilities associated with either made an academic career unattractive to bankers, long-distance merchants, great entrepreneurs, and their sons. On the whole the study of law was not for men who had a fortune but for those who wanted one.

The typical jurist, in other words, was one of a small group of literate ambitious men who lived in cities and owed their standing in society to their mastery of a very special kind of knowledge. Having relied on his talents to rise to

3 The extent of our devotion to that inheritance is best appreciated by reading critics as direct as Whitehead, *Science and the Modern World*, and Feyerabend, *Against Method*.

the top, he was likely to prefer merit to birth as a basic criterion of social order. To that extent he favored liberty and {34 | 35} equality over hierarchy. Having relied on knowledge to rise to the top, he was likely to oppose custom on the grounds of reason, and unlikely to have much sympathy for, or understanding of, the uneducated, whether they had a title of nobility or not. To that extent he may be considered a reformer and a progressive. Since he lacked any power of his own, he had little choice but to ally himself with those among the powerful who were most likely to draw on his knowledge in return for a salary, which is to say kings, princes, and urban governments attempting to establish control over, and extract taxes from, their subjects—whether they had a title of nobility or not. To that extent he may be considered an instinctive supporter of the state.

It should go without saying that these few words capture only very little and nothing without exception. But there may not be much more that can be said about late medieval and early modern jurists in general. If there is, we do not know it. The evidence is fragmentary and complex. Even simple questions like how many students studied law at a given university, precisely what they studied, and what they went on to do thereafter, are impossible to answer until technical problems of great difficulty have been solved, and often remain impossible to answer even then. The state of our knowledge is best described as a great darkness interrupted by bursts of brightness in a few widely separated spots where the evidence is plentiful and someone has spent years studying it.[4] Under those circumstances the little that has just been said is already too much.

4 Among the brightest spots are the studies of Suzanne and Sven Stelling-Michaud, *Juristes suisses à Bologne*, and Stelling-Michaud, *L'université de Bologne*, on Swiss students of law at the University of Bologna and their subsequent careers, and Coing, *Römisches Recht*, Kagan, *Students and Society*, Kagan, *Lawsuits and Litigants*, and the quantitative analyses of Ranieri, *Recht und Gesellschaft*. They supply numbers that, although never as hard as they look, at least suggest orders of magnitude. For example: in the sixteenth century the University of Padua had 20 salaried, that is, full, professors of law; most German universities had no more than 4, 5, or 6 professors of law, half teaching Roman, half, canon law; in 1394, 256 bachelors and 368 scholars of law were registered at the University of Orléans; in the second half of the fifteenth century an average of about 1,000 students are estimated to have been studying law in Germany at any given time; Coing, *Römisches Recht*, 61, 66–7. The supreme court of the Holy Roman Empire tried about 9,900 cases during the first fifty-five years of its existence from 1495 to 1550, and almost twice as many, 19,300, during the next fifty years from 1550 to 1600; Ranieri, *Recht und Gesellschaft*, 1:135–7. One may add Carlo Cipolla's estimate that there were 5 physicians, 20 lawyers, and 250 notaries per 10,000 inhabitants in the city of Milan in 1288, and 5 physicians, 7 lawyers, and 26 notaries per 10,000 inhabitants in the city of Verona in 1545; Cipolla, *Before the Industrial Revolution*, 83.

There was, however, one other thing to unite canonists and civilians: their allegiance to a definite and relatively small number of books collected in two sets that have since the sixteenth century been called *Corpus iuris civilis* and *Corpus iuris canonici*, the body of civil and canon law, respectively.[5] The jurists believed that these books contained "reason in writing" (*ratio scripta*) as they sometimes put it. More specifically, they believed that these books were sanctioned by God's universal representatives, pope and emperor, and contained universally valid answers to questions of right and wrong.

This had two main consequences, both of which are fundamental for an understanding of their notions of order. First, no jurist worth his salt was willing to give, or allow others to give, answers to questions of right and wrong that could not be found in, derived from, or reconciled with, the texts of the civil and canon law. All jurists were pledged to a definite method. The method did not always work. It depended on the skill of individual jurists and often resulted in {35 | 36} contradictory answers. But it was an enormously powerful tool to sanction certain views of right and wrong and reject others.

Second, the jurists were bound to the doctrines and concepts contained in the body of canon and civil law. Many of these were in dispute and they are far too numerous even to adumbrate in outline. Three may nonetheless be singled out for mention because they are basic and conveniently gathered at the very beginning of the *Corpus iuris civilis* and the *Corpus iuris canonici*. First, law was divided into two basic types: natural law and human law. The former was universal and directly founded on reason. The latter was limited to specific communities and founded on reason only in a qualified sense. Second, according to natural law human beings were free and equal. Third, law was distinguished from custom: law was written and formally promulgated, custom was not. The precise meaning of any one of these terms was never settled (and always different from its meaning in modern times). But one thing was settled:

5 The *Corpus iuris civilis* was issued by Emperor Justinian in the sixth century and consisted of four books: the *Institutes*, the *Digest*, the *Code*, and the *Novels*. The *Corpus iuris canonici* consisted of four books that were issued over a period of time from 1140 to 1317: the *Decretum* of Gratian (about 1140), the *Liber extra* of Pope Gregory IX (1234), the *Liber sextus* of Pope Boniface VIII (1298), and the *Clementinae* of Pope Clement V (1317). The medieval version of the *Corpus iuris civilis* also contained certain constitutions of medieval emperors, and the *Corpus iuris canonici* a number of so-called extravagants that were not reliably identified until the early modern period. For basic information with further bibliography see R. E. Reynolds, "Law, Canon: To Gratian," in *Dictionary of the Middle Ages*, 7:395–413; Chodorow, "Law, Canon: After Gratian," in *Dictionary of the Middle Ages*, 7:413–17; and Donahue, "Law, Civil," in *Dictionary of the Middle Ages*, 7:418–25.

if anyone was going to determine the meaning correctly, it would be properly trained jurists.

This tended to put the jurists at odds with two other types of men: those who preferred to answer questions of right and wrong by referring to other books and those who preferred to refer to no books at all—or at least not to books written in Latin. Theologians did the former, followers of custom the latter. Theologians worried that jurists would exceed the limits of their authority and forget that the most important questions of right and wrong were answered by the Bible, also a collection of books and in some ways overlapping with Roman and canon law, but containing writings of a different sort that were thought to have been directly revealed by God himself. Their worries were only increased by the opening words of the *Digest* according to which jurists

> are deservedly called priests, because we cultivate justice and profess knowledge of the good and the equitable, separating what is equitable from what is iniquitable, discriminating between the licit and the illicit, desiring to produce good conduct not merely through fear of punishment but also through the promise of rewards, teaching, if I am not mistaken, true, not feigned, philosophy.[6]

Followers of custom, meanwhile, were dismayed to learn that experts in Roman and canon law, far from practicing the good and the equitable, were quick to brush aside conventions they did not know, reject cases that had not been brought according to the proper procedure, and ignore wrongs for which they found no admissible evidence. {36 | 37} Theologians and followers of custom shared a suspicion that the jurists' allegiance to civil and canon law was dishonest because it sometimes appeared to fly in the face of the will of God or the obvious facts of the case. On occasion, as during the Reformation, that suspicion could fuel powerful alliances and undermine the jurists' self-confidence. Yet in the long run it always proved to be weaker than the ties by which those who had received a professional education were joined to each other and divided from those who had not.

6 Dig. 1.1.1.1 (my translation).

3 Canonists and Civilians: The Contrasts and Divergences

Canon law and civil law were two separate bodies of texts. One was rooted in the church, the other in the Roman Empire. Each had its own characteristic doctrines, and sometimes they conflicted with each other. Canon lawyers, for example, regularly identified natural law with divine law; Roman lawyers were less willing to do so. The most obvious division among canonists and civilians thus was the division of canonists from civilians. It was turned into law in 1219 when Pope Honorius III (r. 1216–27) prohibited priests and members of religious orders from studying civil law. To a certain extent it also coincided with a geographic boundary. In Italy and Southern France, where knowledge of Roman law was most extensive, jurists were often laymen. In the rest of Europe, where canon law played a more important role, they were almost invariably clerics. It was only in the period considered in this essay that university-trained jurists who did not belong to the clergy began to outnumber those who did even in Northern Europe.

Important though it is, however, the division of canonists from civilians must not be exaggerated, as happens all too easily when modern observers forget how deeply the church was rooted in the Roman Empire. For the most part and in the long run relations between canon and civil law were far more peaceful than the decision of Honorius III might suggest. Canon law not only borrowed texts and principles directly from Roman law but also drew on Roman law in indirect ways. In the absence of Roman law canon law would have been incomplete and, in parts, unintelligible. Hence many clerics did study civil law, especially those in lower orders whom the prohibition of Honorius III did not affect because they did not (yet) exercise the care of souls or belong to a religious order.[7] "The church lives by Roman law" was a {37 | 38} familiar and entirely appropriate maxim. Roman law, meanwhile, was not enough for any lawyer worth his salt in an age when marriages and testaments—perhaps the two most important instruments for the massive transfer of property known to the world—fell under the jurisdiction of the church. Hence it became increasingly common for jurists to study both kinds of law, call themselves "doctor of both laws" (*doctor utriusque iuris*), and look down upon colleagues who knew only one kind of law. Fundamentally, the relationship between canonists and civilians was one of complementation, not contradiction. No one else managed to pay more balanced respect to texts coming from classical antiquity and what is sometimes called the Judeo-Christian tradition.

7 Genzmer, "Kleriker als Berufsjuristen."

Different levels of training and different careers made for more important lines of demarcation. In the first place many of the people who knew something about Roman and canon law did not really qualify as canonists or civilians strictly speaking. This includes scribes and notaries who had studied the art of writing letters (*ars dictaminis*) or the art of authenticating documents by entering them in a public register (*ars notariatus*). Scribes and notaries had to know at least parts of the law and they far outnumbered fully trained jurists. More than anyone else they helped to spread knowledge of Roman and canon law in everyday use. But they ranked far below doctors of law. There were also distinguished individuals like Lorenzo Valla (1407–57), the son of a doctor of both laws who is justly regarded as one of the most important figures in early modern legal thought, but who never received a formal legal education. We also ought not to forget people who did study law for a while, but dropped out in disgust, like Ulrich von Hutten (1488–1523).

In the second place some doctors and licentiates of law cannot be considered civilians or canonists except in a purely formal sense because they devoted their careers to rather different pursuits, like Leon Battista Alberti (1404–72), Johann Reuchlin (1454/5–1522), Andreas Karlstadt (1480–1541), and John Calvin (1509–64), all of whom are serviceable examples of professionally trained lawyers not generally known for their legal expertise.

In the third place canonists and civilians in the full sense of the word went on to use their knowledge in very different ways. A few of the most popular ways are worth specifying: one was to become a professor of law, another was to work in the courts of the church, but above all university-trained jurists were ever more often employed in government, first in the church, then in the state. Their particular {38 | 39} combination of expertise and pliancy made them exceptionally desirable members of the councils of state on which early modern monarchs relied in their struggle to bring the nobility to heel. There they left their most important imprint, and there they had a chance to rise to positions of great power themselves. In the church they often rose to the very top.[8]

Conspicuously absent from this list of typical careers for canonists and civilians are the courts of lay society and what you might call private practice. From the beginning of our period both were well represented in Italy. But outside of Italy the courts of the laity were usually staffed, and the laity given legal advice, by followers of custom. University-trained professionals replaced them only during our period, slowly at first, very rapidly towards the end, but in any event

8 Among the thirty-three popes who ruled from 1400 to 1600 fifteen had studied law, eleven were doctors of law, and four had at one time been professors of law. This includes the four popes who are sometimes referred to as anti-popes and is based on information taken from entries under individual popes' names in the *New Catholic Encyclopedia*.

only after they had proved their worth as councilors, chancellors, and diplomats to the rulers of Europe.

Finally, and most important for the purposes of this essay, canonists and civilians were divided over the meaning of the laws they studied. They debated more issues and disagreed more deeply in more ways than one can even begin to suggest without a detailed examination of the evidence. Four issues may nonetheless be singled out for special attention because they were fundamental and especially clearly related to conceptions of order.

The first was where to locate supreme authority in the church. Conciliarists like Francisco Zabarella (ca. 1339–1417) argued that supreme authority rested with general councils, that such councils derived their authority directly from Christ, and that even legitimate popes could be compelled to obey them in matters concerning the unity, faith, and general reform of the church.[9] Papalists like Pedro de Luna (1328–1423), better known as Pope Benedict XIII (r. 1394–1417), argued that supreme authority in the church rested with the pope, that he was exempt from the judgment of any human being, including human beings assembled in a general council, and that no council could be regarded as legitimate unless it had been approved by the pope.[10] The issue had been debated since the twelfth century, but it was not fully joined until the outbreak of the Great Schism in 1378. For about three generations the champions of general councils engaged the champions of the papacy in an intellectual and political struggle involving all of Europe. When the dust settled in about 1450 the papacy had recovered its balance. Thereafter it made very sure that no council would ever again contest its control over the church. Nonetheless {39 | 40} conciliarists continued to maintain their cause throughout the early modern period and, in the view of some, had the last word in the Glorious Revolution of 1688 and in the writings of John Locke (1632–1704).[11]

The second issue dividing canonists and civilians concerned the question how to resolve differences over the meaning of canon, and especially, Roman law. Many jurists believed that the best way to proceed was to build on the interpretations that had been worked out by the so-called glossators and commentators since the eleventh century. Typically they stayed close to the texts of individual laws and dealt with them in the order in which they appeared in the *Corpus iuris civilis*. They are often called Bartolists, after Bartolus of Sassoferrato (1313/14–1357), one of the most influential jurists of the later Middle Ages, and their method "scholastic" or "the Italian manner" (*mos italicus*) because it had

9 Tierney, *Foundations*, 220–37; Morrissey, "Decree 'Haec Sancta'."

10 Glasfurd, *The Antipope*.

11 Figgis, *Studies of Political Thought*; Oakley, "On the Road." {See now Oakley, *Conciliarist Tradition*.}

been perfected in Italian schools of law and continued to flourish there, but by no means only there, until well into the early modern period.[12] The others believed that it was necessary to make a fresh start because the older interpretations were written in atrocious Latin, founded on corrupt versions of the texts, and marred not only by logical inconsistencies but also ignorance of history. Typically they spent much effort on philology and grammar in order to reconstruct the original text of the ancient laws and expose what they considered to be the errors of the Bartolists. They also liked to interpret the law by devising broad conceptual schemes that seemed more rational than a text-bound approach. They are usually called legal humanists and their method "the French manner" (*mos gallicus*) because their most famous practitioners taught at French universities like Orléans, Toulouse, and above all Bourges.[13] Legal humanists captured a great deal of attention because of the novelty of their discoveries, the elegance of their style, and the trenchancy of their analysis. Bartolists, however, were by no means ready to concede and continued to predominate in less conspicuous but no less important places, both because of the sheer weight of tradition and their unparalleled ability to settle specific legal difficulties in specific settings, including the setting where it often mattered the most, namely, in court.

The third issue was, of course, the Reformation. The main question with which the Reformation confronted canonists and civilians was this: Could the doctrine of salvation by faith alone be reconciled with canon and Roman law, or could it not? Many jurists thought that it could not. They recoiled in horror from ideas that threatened not only {40 | 41} to deprive them of their professional existence but also to throw the entire world into turmoil. They went on to defend the law by editing new and improved versions of the basic texts and glosses, collecting the best existing legal scholarship, and rethinking their positions from the bottom up. Two of their efforts are worth mentioning: the first authoritative edition of the *Corpus iuris canonici* and the *Tractatus universi iuris*, down to the present day the most comprehensive single collection of the best that Romano-canonical jurisprudence had to offer.[14] Others, meanwhile, were convinced that Roman and canon law could very well be reconciled with salvation by faith alone if only they were correctly distinguished from divine

12 Astuti, *Mos italicus*.

13 Maffei, *Gli inizi dell' umanesimo*; Kisch, *Erasmus und die Jurisprudenz*.

14 *Decretum Gratiani emendatum* (1582); *Decretales D. Gregorii Papae IX* (1584); and *Tractatus universi iuris* (1584–86). Both of these efforts came to fruition under the leadership of Pope Gregory XIII (r. 1572–85), a doctor of both laws who had taught at the University of Bologna from 1531 to 1539 and counted future cardinals like Reginald Pole (1500–58) and Alessandro Farnese (1520–89) among his students; *New Catholic Encyclopedia*, 6:779–81.

and natural law properly speaking and recognized as products of human action and historical circumstance. They, too, had their brilliant successes, among which we may mention the investigations into the history of law by French Huguenots, an edition of the *Corpus iuris civilis* with a new set of glosses by Denis Godefroy, or Dionysius Gothofredus (1549–1622), the proliferation of ecclesiastical legislation in Protestant territories, and the veritable explosion of public law in the Holy Roman Empire just after the end of our period.[15]

The fourth and final issue was the question whether or not supreme authority in the state was to be given to the people or to their sovereign ruler. This was in many ways a replay of the debate between conciliarists and papalists. It resulted from a schism between two confessions and pitted temporal constitutionalists against temporal absolutists, just as a schism between different papal obediences had pitted ecclesiastical constitutionalists against ecclesiastical absolutists. It involved similar arguments and it often drew on the same sources. It had also been in the air since the high Middle Ages, but it was not fully joined until the very end of our period, and it was most effectively joined in France. On the one hand it was argued that rulers were servants of the common good and subject to the laws. Hence the people had a right to resist and depose rulers who violated the law—and if not the people as such, then at least the magistrates who represented the people in general assemblies. Among the most important authors taking this point of view was François Hotman (1524–90), who had studied Roman law in Orléans.[16] On the other hand it was argued that public order was impossible to preserve unless rulers had the right to put an end to public controversies without possibility of resistance or appeal. Such rulers were not above divine and natural law, but they were above, or absolute from, human law. Among the most important {41 | 42} defenders of that position was Jean Bodin (1529/30–1596), who had studied Roman law in Toulouse.[17]

This sketch of the main issues dividing canonists and civilians is both rough and incomplete, but it is enough to make a point and raise a question. The point is that wherever and whenever fundamental issues of order were debated in early modern times, canonists and civilians can be found on both sides of the debate. Moreover, the stand a jurist took on any one of these issues did not determine his stand on any of the others. Supporters of papal supremacy sometimes maintained and sometimes denied that people had a right to resist their sovereign rulers. So did the followers of Luther and practitioners of the

15 Kelley, *Foundations*; Stolleis, *Geschichte des öffentlichen Rechts*.

16 Kelley, *François Hotman*.

17 Franklin, *Bodin and Absolutist Theory*.

mos gallicus. Supporters of absolute monarchy sometimes supported Luther and sometimes the pope. So did theorists of resistance and practitioners of the *mos italicus*. No stereo-type stands up to scrutiny, especially not the one according to which experts in Roman law were born supporters of absolute monarchy, experts in canon law born allies of the papacy, and both sworn enemies of Luther.[18] The question is whether canonists and civilians took their positions according to chance or some discernible pattern.

4 Legality and Legitimacy

In order to deal with this question it may be useful to make a distinction. Law consists of rules that tell you how to behave. These rules are not necessarily good and they can be broken. Thus people using laws have two entirely different ways of doing wrong (or right): they can do wrong (right) by breaking a rule that is good (bad), but they can also do wrong (right) by following a rule that is bad (good).

This is a source of endless confusion. In order to keep matters straight, theorists of law distinguish between legality and legitimacy.[19] Legality relates to conduct: conduct is legal if it agrees with the rules and illegal if it does not. Legitimacy relates to the rules: the rules are legitimate if they deserve to be followed, and illegitimate if they deserve to be changed or broken. Conduct is lawful in the full sense of the word only if it comprises both elements: it must follow the law and the law must be legitimate.[20]

The question is, of course: Who decides what is legitimate and how? It is a simple question. But the answer is necessarily uncertain. It could be certain if, and only if, it could be given according to some rules. But {42 | 43} rules are precisely what the question is about. Since the legitimacy of every rule can

18 One of the last bastions of stereotype has just been conquered by van Gelderen, *Political Thought*, 273, concluding for the importance of Roman law to the Calvinist leaders of the Dutch revolt against Philip II.

19 The point of the distinction is not affected by the different terms that can be used to make it. Plausible alternatives to legitimacy include authority, validity, equity, morality, and justice.

20 Hence law is often defined as consisting of two elements, whether it is Thomas Aquinas defining law as "a certain dictate of reason for the Common Good [ergo legitimate], made by him who has the care of the community and promulgated [ergo legal]," or Philip Selznick defining the elementary legal act as an "appeal from an *asserted* rule, however coercively enforced [ergo legal], to a *justifying* rule [ergo legitimate]." See Thomas Aquinas, *Treatise on Law*, 145, and Selznick, "Sociology of Law," 52.

reasonably be questioned the answer cannot be founded on any rule without begging the question. This is not obvious so long as any rules remain that have not yet been questioned. But once they are, the distinction between legality and legitimacy breaks down and questions about conduct turn out to be impossible to keep apart from questions about rules. In the end there remains no surer way to answer questions of right and wrong than to do the best one can and wait and see whether or not others will agree.[21]

Some people believe that the trouble with legitimacy is unique to modern Western societies governed by complex bodies of written law under conditions of capitalist production.[22] But that seems unlikely. Questions about conduct can be distinguished from questions about rules of conduct wherever and whenever people rely on rules that can be broken, regardless of whether these rules are customary, legal, moral, ethical, religious, written, unwritten, natural, or unnatural. Distinctions like those between the letter and the spirit of the law, natural and human law, custom and abuse, *nomos* and *physis*, and perhaps even the distinction between right and wrong itself suggest that the trouble with legitimacy is as old as the inclination, or ability, of people to break rules. To that extent small societies of hunters and gatherers following customs transmitted by word of mouth or imitation are exactly like large industrial societies governed by written codes of law.

At the same time writing down the rules does have important consequences. Above all it makes them easier to identify. That has definite advantages. If you want to know whether an alleged but unwritten rule does in fact exist, you have no option but to ask as many people as you can whether or not they have heard of the rule in question and hope they are willing and able to answer. If they are not, you have little choice but to wash your hands of the question or perhaps impose a rule of your own devising. In either case it will be difficult to tell whether the dispute is about rules or about conduct, and force is likely to be used not only when undisputed rules call for some wrong to be avenged or punished (or prevented), but also when the rules are in dispute and it is not at all clear whether any wrong has even been committed. That can make for real injustice.

Not so with written law. If you want to know whether an alleged law does in fact exist, you need ask no one. You merely need to look it up. Most of the time

21 Attempts are sometimes made to remove the uncertainty by distinguishing between two kinds of rules: rules that tell you how to behave and rules that tell you how to distinguish legitimate rules from illegitimate rules. For a modern example see Hart, *Concept of Law*. That distinction breaks down as well because, although there may be two kinds of rules, there is only one kind of people and they have to apply both kinds of rules.

22 See Connolly, ed., *Legitimacy*.

that is enough. If it is not, because the law in {43 | 44} question is doubtful, obscure, or poorly suited to the circumstances of the case, you may have to do some careful thinking until you arrive at a satisfactory answer, but you will have no good reason to use force until the question about the law has been settled. When law is written down questions of legality are easier to distinguish from questions of legitimacy. That increases the chances that force will be used to make conduct conform to the rules, but not to settle questions about the rules. Written law thus makes the use of force more predictable and helps to avoid the kind of injustice that occurs when someone is punished for breaking a rule unawares or in good faith.

These are the advantages people have in mind when they call the jurists' method rational. But written law has disadvantages, too. One is that written laws can exist without being known because the books in which they are written can exist without being read. For most of recorded history most people could not read books, and even nowadays most of the people who can read books do not read books of law. Hence it is not only possible but likely that most of the people living in a society governed by written laws do not know those laws—especially if the laws happen to be written in a foreign language, as was the case with Roman and canon law in the Middle Ages. That is a source of considerable doubt about the legitimacy of the law.

The other disadvantage is that written law is harder in some ways to change than custom. This is not only because old laws stay on the books forever unless someone takes the trouble to remove them. It is also because written laws are more easily turned into a foundation for coherent logical systems. Above all else it is because people who understand coherent logical systems tend to identify with them. The more coherent the system, the more difficult it will become for them to change the law without threatening the system, and the more they are invested in the system, the more likely the law will lag behind social realities. That is a second source of considerable doubt about the legitimacy of the law.

These doubts can reinforce each other. There is nothing like a thoroughly developed legal system to pinpoint the need for change. But what if the law itself needs to be changed? Who can change a thoroughly developed legal system peacefully? Not the people, because they do not know what it is, and not the jurists, because their existence depends on it. Under such circumstances violence may seem, not an attractive, but the only option. If written law is preferable to custom in that it prevents the unpredictable use of force most of the time, it can {44 | 45} also make the unpredictable use of force inevitable some of the time and thus lead into a crisis of legitimacy more intractable than anything imaginable under custom.

5 History of the Subject

Precisely such a crisis occurred in late medieval and early modern Europe. It began roughly when the defeat of Emperor Frederick II (r. 1220–50) proved that the emperor was powerless to rule the world. That raised the question: Which law is good? In the past the jurists had answered: the law is good if God approves of it, and God approves of the laws written in the *Corpus iuris civilis* and the *Corpus iuris canonici*. Now that answer was no longer quite acceptable. When about fifty years later Pope Boniface VIII (r. 1294–1303) was, for all intents and purposes, assassinated by the lieutenants of the king of France and the papacy forced to take up residence in Avignon, it became even less acceptable. The crisis ended when a new answer found general agreement. That answer was this: the law is good if it is approved by a sovereign ruler—and it is to be hoped, but impossible to know, if God approves of it as well. The history of visions of order among canonists and civilians from 1400 to 1600 consists largely of the answers that were given in between.

One of the earliest answers was also one of the most brilliant, even in the very long run of European legal history. It was given in Italy, which is no accident, because Italy was the place where the professional study of law had been invented and where the authority of pope and emperor had been most strikingly undermined. Its author was Bartolus of Sassoferrato (1313/14–1357). Bartolus pointed out that the refusal of the Italian cities to obey the emperor did not violate the authority of Roman law in and of itself because the authority of Roman law was universal whereas the authority of the Italian cities was not. The laws made by cities were as valid as the laws of the emperor, except that they were valid only for the city concerned, whereas the laws of the emperor were valid for the world as a whole, but only for the world as a whole and not necessarily for any particular place. The laws of the cities and Roman law thus ranged on different planes of legal reality. The well-known formula for this solution was that the emperor was *dominus mundi* ("lord of the world") and *Princeps* with a capital P—and Bartolus insisted that anyone who denied the emperor's right to {45 | 46} rule the world as a whole was in danger of heresy—while cities became *sibi princeps* ("princes unto themselves"), with a small p. The same solution helped to account for kings and princes who denied the emperor the right to interfere in the affairs of their realms, like those of France or England.[23]

23 Interpreters of Bartolus are sharply divided on this crucial issue. See, e.g., David, "Contenu de l'hégémonie impériale," to whom I owe the point about *Princeps* with a capital P; Keen, "Political Thought," and Skinner, *Foundations*, 1:9–10. My own interpretation is based on a close reading of Bartolus's commentary on Dig. 6.1.1 in Bartolus, *Opera*, 1:172^{rb}, s.v. 'per

Bartolus thus rescued the legitimacy of Roman law by distinguishing universally valid law from locally valid law. But the distinction had a cost, and the cost was the possibility of tyranny. So long as Roman law was thought to apply to each and every place in the world, tyrants were easy to identify: they violated the law. But if local governments were allowed to make their own laws, tyrants were harder to recognize. What if a tyrant seized control of a local government and started making bad law? How could you tell the difference between the laws of a tyrant and the laws of a legitimate government? There was a very real possibility that following the law might actually be wrong—and it is worth reading the opening pages of Bartolus's tract on tyranny for an expression of the stomach-turning horror which that possibility provoked.[24]

Bartolus responded with a legal theory of tyranny that was squarely founded on the distinction between legality and legitimacy. Tyranny came in two forms: tyranny by title and tyranny by conduct. Tyrants by title were both illegitimate and illegal because they acquired and exercised their power in evident violation of the law. That was the easy case. Tyrants by conduct were illegitimate in fact, but appeared to conform to the standards of legality. That was the hard case. Bartolus, however, was convinced that even tyranny by conduct could be proved and controlled by legal means that included a prominent role for pope and emperor in their capacity as chief guardians of universal law. There is no space here to analyze his reasoning, fascinating though it is, in any more detail. The point to keep in mind is this: Bartolus identified tyranny as the main danger to the legitimacy of law and, as his very choice of the term tyranny suggests, tried to solve it by relying on existing law. That established the terms of the debate.

Those terms were confirmed by the conciliar movement. When the papacy tried to escape from French tutelage and returned to Rome, the result was the Great Schism (1378–1417) between two and eventually three popes. Everyone knew there could be only one legitimate pope, but no one knew which one it was. If anything ever raised the specter of tyranny in medieval times, that did. The conciliarists banished the specter by elaborating a theory of conciliar government that was {46 | 47} squarely founded on existing canon law. They argued that on matters concerning the universal church the pope was obliged to obey a general council. If he did not, he could be legally deposed in spite of the papacy's basic exemption from human judgment. With the active support of the emperor they put their views into practice in a series of councils that

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hanc actionem,' nrs. 1–2, and on Dig. 49.15.24 in Bartolus, *Opera*, 6:228ra, s.v. 'hostes,' nrs. 3–7, along with the cross-references given there.

24 Bartolus, "On the Tyrant," here pp. 9–10, and Bartolus, "Tractatus de tyranno," here p. 175.

met during the first half of the fifteenth century. The conciliar movement may thus be interpreted as an attempt to do for the church and canon law what Bartolus had done for the Italian cities and Roman law: restore legitimacy by relying on existing law.

The views of Bartolus and the conciliarists amount to something of a European prototype for dealing with tyranny by legal means. They remained influential far into the early modern period and have in some ways never been overtaken. But they had a serious weakness: they presupposed the very law that was in doubt. The weakness was quickly exposed by Jean Petit's (d. 1411) advocacy of tyrannicide and John Hus's (ca. 1370–1415) attack on the hierarchical church, to choose two examples from the conciliar movement. The fathers at the Council of Constance (1414–18) condemned the former and executed the latter. That was consistent with their understanding of the law. But the consistency was lost on people who wondered why the fathers were allowed to attack the papacy whereas Jan Hus was not. When the Council of Basel (1431–49) turned on an undisputed pope, even supporters of the conciliar cause began to think that general councils displaced, but did not solve, the problem of tyranny.

At this point the terms laid down by Bartolus and the conciliarists were exhausted. Yet there was no plausible alternative. The period following the demise of the conciliar movement is therefore best characterized as an ambiguous mixture of veiled tyranny, official legality, and an intensive search of the records for better terms. Tyranny was everywhere suspected, but nowhere talked about—except as regards the Turks, whose conquest of Constantinople in 1453 confirmed the fear of tyranny while helpfully distracting attention from tyranny at home. Reform was everywhere demanded, and yet expressions of popular piety reached unprecedented heights while papal, imperial, and princely courts presided over spectacular achievements in patronage. Meanwhile the jurists began to look more carefully at ancient sources of the law and to experiment with new interpretations. But far from establishing common ground they undermined the law still further by fueling new debates and demonstrating that some of the most famous parts of law, including the Donation of Constantine and the Pseudo-Isidorian decretals, were outright forgeries. {47 | 48}

The ambiguities were not resolved until Niccolò Machiavelli (1469–1527) and Martin Luther (1483–1546) proposed alternatives to law. Machiavelli and Luther could hardly have been more different from each other: one was an Italian diplomat and humanist, the other a German monk and theologian; one sought legitimacy from the mastery of politics and time, the other from faith in the eternal word of Christ. But they were united on one point: both rejected

law as a source of legitimacy. Both thought that law and tyranny went happily together; both insisted that the gap between legitimacy and legality—faith and works in Luther's terms, how we ought to live and how we do live in Machiavelli's—was utterly unbridgeable; and both defined virtue in ways that flew in the face of law as it was understood by jurists. Machiavelli and Luther made it possible to call someone prince whom Bartolus called tyrant, and Antichrist whom the established church called pope.

In point of principle the solutions offered by Luther and Machiavelli were equally plausible—and equally capable of throwing societies founded on law into upheaval. That may explain why some contemporaries lumped them together and why they continue to be controversial nowadays. Their view that virtue is incommensurate with rules was heresy then and still is heresy today—one measure of the extent to which the jurists have managed to hold their own. But in point of practice there was an important difference: Luther spoke to everyone; that made him dangerous. Machiavelli spoke to princes and humanists; that made him safe, which may explain why he did not acquire the reputation of having justified every conceivable form of immorality until after Luther's views had inspired popular uprisings that put the fear of God into established governments. Fear of God and people forced princes to realize that they could not do without law, converted them to anti-Machiavellianism, and helped to save the jurists from danger of extinction.

The solution the jurists adopted in the end was as ingenious as it was simple. Since Bartolus they had been wondering how to restore legitimacy to the law without begging the question. But begging the question had turned out to be inevitable except at the cost of uncontrolled violence. That left but one choice: question-begging must be turned into a point of principle. The principle was stated by Jean Bodin (1529/30–1596), one of the greatest civilians of the later sixteenth century. Bodin agreed with Luther and Machiavelli that the gap between legality and legitimacy could not be bridged by any of the means so far considered. But {48 | 49} he refused to trust in faith or politics. Like Bartolus he placed his trust on law. But unlike Bartolus he thought that rulers had to have absolute control over the law. The word for that control was sovereignty. Sovereign was he who made the law, and law was what the sovereign said it was. Sovereignty was "the absolute and perpetual power of a commonwealth," and its validity as unconditional as that of a tautology.[25]

25 "For although one can receive law from someone else, it is as impossible by nature to give one's self a law as it is to command one's self to do something that depends on one's own will. As the law says, *Nulla obligatio consistere potest, quae a voluntate promittentis statum capit*—which is a rational necessity and clearly demonstrates that a king cannot be subject to the laws." Bodin, *On Sovereignty* 1.8, trans. Franklin, 12–13. Hence Bodin rejected the

Sovereignty changed the terms of the debate for good and made law legitimate again. What was left was to elaborate the consequences. The boundaries between natural, divine, and human law needed to be redrawn. The content of each kind of law needed to be identified. Natural and divine law could no longer be considered enforceable unless a sovereign decided otherwise. The history of human laws needed to be investigated. Sovereigns had to decide which parts of Roman and canon law they would accept and why. New laws needed to be developed in order to regulate relations between sovereigns—a task most expeditiously completed by Hugo Grotius (1583–1645), a doctor of both laws with a degree from Orléans and, next to Bodin, perhaps the most important thinker to put an end to the debate about the legitimacy of the law. In short, the period to follow saw a profusion of legislation and writings on all kinds of law and legal questions. Many of these, like those on canon law and those from Spain, are poorly understood. But none of them went back on principles that were effectively summed up by Jean-Jacques Rousseau (1712–78):

> What is good and in conformity with order is such by the very nature of things and independently of human agreements. All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should need neither government nor laws. There is undoubtedly a universal justice which springs from reason alone, but if that justice is to be acknowledged as such it must be reciprocal. Humanly speaking, the laws of natural justice, lacking any natural sanction, are unavailing among men.[26]

Sovereignty had evident advantages. It defined an institution whose legitimacy remained intact even where the law was in dispute and thus settled the violence that had erupted all over Europe. But it did so by transforming the distinction between tyrants and legitimate rulers from a matter of law into a matter of conscience. At a time of political, religious, and military turmoil that was a plausible concession. But after four hundred years of experience with sovereignty, in a century that has {49 | 50} strained conscience beyond

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Aristotelian distinction between good and bad governments, considered tyrants to be sovereigns, described sovereignty as an unconditional gift, distinguished categorically between contracts (which are binding on the sovereign) and laws (which are not), and drew the stunning conclusion that "it is a kind of legal absurdity to say that it is in the power of the prince to act dishonestly, since his power should always be measured by the standard of justice." Ibid., 1–2, 6–8, 13–15, 39.

26 Rousseau, *Social Contract* 2.6, trans. Cranston, 80–1.

the breaking point, it may be worth giving Luther and Machiavelli a second hearing.

6 Conclusion

Three separate processes can be distinguished in this account: the first is the gradual replacement of custom by written law; the second is the shift in control over written law from pope and emperor to sovereign nation states; and the third is the elaboration of different national traditions of law and attitudes to law.

The first of these three processes began long before the period here under consideration, in the eleventh century, and culminated long after in the great codifications of the nineteenth and twentieth centuries. It spread from Italy, where the connection to ancient Roman law was strongest, to the rest of Europe and, more recently, the world. It was led by clerics in medieval, and laymen in modern, times. It went through different phases at different speeds. But it has not been reversed for close to a thousand years.

The second process coincides more closely with the period under consideration. It is in fact one of the reasons to regard the period as a unit. It was fueled by doubts about the legitimacy of Roman and canon law and the two universal institutions claiming responsibility for that law. Because it undermined those institutions it could be, and was, mistaken as a reversal in favor of the good old law so heartily desired by ordinary people. But because it shifted the responsibility for law from universal institutions to the sovereign rulers of territorial states, it actually increased the authority of written law still further.

The third process may explain why the conciliarists met in southwestern Germany, why an Italian wrote *The Prince*, why the Reformation began in Saxony, and why a lawyer from Angers invented sovereignty. But it is not nearly as well understood as the other two. There are some trenchant analyses of nations and nationalism from the perspective of the social sciences.[27] They suggest that nation states are made by literate elites. Since jurists figure prominently among those elites, the different experiences of jurists in countries completely, half, or barely familiar with written law may well explain some of the differences between Italy, France, and Germany—not to mention England, the only European country with a class of professional jurists trained outside the universities. But most historians either presuppose that nations have existed since the origins of time or else dismiss them as {50 | 51} unworthy

27 See especially Gellner, *Nations and Nationalism*, and Anderson, *Imagined Communities*.

of attention. Most national histories thus reproduce more than explain the differences between the nations.[28]

From hindsight these processes are relatively easy to distinguish. In historical reality, however, they are inseparably connected. That accounts for the complexity of the subject, confusing both contemporaries and historians. Luther, to take a case that illustrates the source of the confusion clearly, went out of his way to prove that he was utterly uninterested in conduct. What interested him was faith.[29] To use the terms of this essay: he was interested in what made the law legitimate, not in legality. But since there was no general agreement on what made law legitimate—not even agreement on the distinction between legitimacy and legality itself—it was impossible to say whether his views undermined or strengthened existing law or conduct. For the same reason it was impossible to say whether the views of Bartolus, the conciliarists, Machiavelli, and Bodin undermined or strengthened existing law or conduct—and it is possible to say from hindsight only on the assumption that today's ideas about the law will not be overturned tomorrow. That helps to understand why German peasants thought they could rely on Luther to support their rebellion against the princes. But it also helps to understand why Luther condemned the peasants with as much conviction as he declared to be concerned with nothing but the faith.

The history of visions of order among the canonists and civilians from 1400 to 1600 is thus best described as part of a protracted struggle to win agreement on the benefits of written law. Precisely how that agreement could be won depended entirely on circumstance. Hence jurists could be found on both sides of every debate. At the same time a single thread of historical and intellectual continuity leads from the early days of the discovery and study of the *Digest* in Bologna to today's disputes about the law. That thread consists of the reasonably constant loss of control on the part of local communities and individuals to centrally organized bureaucracies increasingly staffed by jurists administering written law. The battles pitting papalists against conciliarists, Bartolists against legal humanists, Catholics against Protestants, and champions of popular sovereignty against absolute monarchy are thus somewhat misleading. They obscure the success the literate have consistently enjoyed

28 For an outstanding exception see Pocock, *Ancient Constitution*. See also Coing and Nörr, eds., *Englische und kontinentale Rechtsgeschichte*.

29 See, for example, his statement in the letter he sent to Pope Leo X in 1520: "There is no dispute about conduct between me and anyone else, only about the Word of truth." Luther, "Epistola Lutheriana ad Leonem decimum summum pontificem," in Luther, *Werke*, 7:43 (my translation). The word translated as "conduct" is *mores*, a term uniting conduct with rules of conduct in a way that Luther's distinction was designed to explode.

over the illiterate. Whether or not that is about to end, and the progress of written law about to be reversed by "decodification" in favor of local, customary, and oral arrangements, it seems reasonable to consider, but too early to decide.[30] {51 | 52}

Bibliography

The purpose of the bibliography is to give readers unfamiliar with the field a means of orientation. It is divided into three sections. The section entitled "references" lists bibliographies, handbooks, surveys, dictionaries, basic texts of canon and civil law, and the like. The section entitled "perspectives" is meant for readers seeking conceptual clarity. The section entitled "studies" lists works that have made a major contribution to our understanding of the field, or represent a particular approach to it particularly clearly, or both. In order to include as many different authors as possible I have with rare exceptions mentioned no more than one title per author per section. Since lack of space made it impossible to include a balanced selection of works written by the individual canonists and civilians themselves—not to mention philosophers or theologians with ideas about law—I have mentioned no such works at all. I have similarly excluded reference works limited to specific national traditions. For guidance to such works readers will have to rely on the tools listed in the reference section.

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CHAPTER 16

Sovereignty and Heresy

Sovereignty is normally thought to be a principle of secular truth that is diametrically opposed to religious faith. More rarely it is itself thought to be a religious principle. But given its early modern origins it is perhaps best regarded as a peculiar kind of heresy that opposes only the reach of religious dogma, not its content. That may help to understand three things: first, why religion was successfully expelled from the realm of politics (neutralization of religion); second, why it was reintroduced in the realm of nature (naturalization of religion); and third, why the political consequences of the naturalization of religion have been largely invisible (blinding of the faithful). The chief article of the modern faith defines the boundary between nature and culture. A modern heretic is someone who doubts or violates that boundary against the wishes of the sovereign. If the invention of sovereignty thus put an end to wars of religion, it also made wars of nature conceivable.

Heresy can be defined as "adherence to a religious opinion that is contrary to an established dogma of a church" or, more technically, as "a deliberate and obstinate denial of a revealed truth by a baptized member of the Roman Catholic Church." Sovereignty, on the other hand, can be defined as "supreme power, especially over a body politic."[1]

Heresy and sovereignty thus seem to belong to mutually exclusive spheres. Heresy is a matter of religion; sovereignty is a matter of state. Heresy exists where people believe that religious truths can be grasped with enough certainty to make it worth their while to suppress whoever denies those truths. People like that do not have much use for the concept of sovereignty because they are not normally inclined to consider anyone as holding supreme power over anything, unless it is God's holding supreme power over the world. Sovereignty, on the other hand, exists where people believe that positive laws and standing armies make a better foundation for a body politic than do {381 | 382} religious truths. People like that do not have much use for the concept of heresy because

* Originally published in *Infinite Boundaries: Order, Disorder, and Reorder in Early Modern German Culture*, ed. Max Reinhart (Kirksville, Missouri: Sixteenth Century Essays & Studies, 1998), 381–91.

1 See *Webster's Third New International Dictionary of the English Language* (1961).

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they are not normally inclined to include religious truths among the proper business of a sovereign ruler. At first sight, there does not appear to be much of a relationship between heresy and sovereignty at all.

That is one of the reasons why historians like to divide the history of Europe into a medieval and a modern part. In the medieval part, they say, people did include religious truths among the proper business of rulers and preferred the rule of God over the rule of man. Hence the Middle Ages were dominated by the church and full of heretics as well as their persecutors. But in the early modern period people began to have differences of opinion about religious truths that they found impossible to settle by violent or peaceful means. Hence faith in the rule of God collapsed and heresy disappeared along with the persecution of heresy. Instead, there emerged sovereignty. That is to say, there emerged a kind of public authority that refrained from all attempts to read the mind of God and devoted itself all the more effectively to stopping individuals who believed that they had read the mind of God from knocking their differently-minded neighbors over the head. As a result the modern period has been dominated by the state, reason, and a gratifying tolerance for diversity of opinion, combined with an equally gratifying ability to suppress wrongdoing, which all right-thinking people realize deserves to be suppressed, as opposed to mere wrong-thinking, which all right-thinking people will leave the wrong-thinkers to practice as they please. That, in a nutshell, is the standard account of the history of European political thought.[2]

There is, as far as I can see, only one real alternative to the standard account. It is held by a minority of historians, but the minority is rapidly gaining ground.[3] It seems to be inspired by suspicion of a {382 | 383} historical narrative that makes us moderns look so much better than our medieval forebears, and perhaps by a certain respect for the principle that no one ought to be a judge in his own cause. According to the non-standard account, the disjunction between the spheres of sovereignty and heresy is an illusion. We may call

2 More precisely, it is the underlying assumption that frames standard accounts of the history of political thought. As such, it is present in works like Sabine, *History of Political Theory*, or L. Strauss and Cropsey, eds. *History of Political Philosophy*. It is similarly present in classics with a sharper focus, like Allen, *History of Political Thought*, and Mesnard, *L'essor de la philosophie politique*. But most commonly historians of political thought holding such views act on them by paying little or no attention to the Middle Ages at all.

3 Good examples are Gellner, *Nations and Nationalism*, Moore, *Formation of a Persecuting Society*, and perhaps Said, *Orientalism*, though I am not at all sure that any of these authors would agree with my characterization. Foucault, *Discipline and Punish*, also deserves mention. Farther back there are Becker, *Heavenly City*, and Schmitt, *Political Theology*. Still farther back lurks Nietzsche, *Genealogy of Morals*.

ourselves tolerant and enlightened, but in reality we are just as intolerant and superstitious as our medieval ancestors—if not more so. We no longer persecute heretics, but that is only because we persecute them without calling them heretics. Anyone with eyes to see and ears to hear ought to be able to tell that modern people have practiced persecutions no less, and recently much more, horrible than any practiced by medieval people. What is the nation state if not a church? What does that church aspire to, if not universal dominion? And what are the rights of man if not the articles of a modern faith on whose authority modern inquisitors have sought out, tried, convicted, sentenced, and killed thousands and millions of innocent victims both at home and abroad? In the light of such views the boundary between the Middle Ages and modernity is nothing but a semantic veil by which we try to hide our shame over having made no progress at all from medieval barbarism.[4] {383 | 384}

There is something badly wrong with both of these views. On the surface, they may look very different from each other. But in fact they are not. They are diametrically opposed to each other, and as is often the case with things that are diametrically opposed, the similarities are greater than the differences. Both accounts reduce the range of possible relationships between heresy and sovereignty to two: either the spheres of heresy and sovereignty are mutually exclusive, or they overlap. Either there is a real boundary between medieval religious thinking and modern secular thinking, or there is not. In the first case, sovereignty is seen to be a principle of secular truth that is diametrically opposed to religious faith. Hence there can be no heresies in the modern world. In the second case, sovereignty is seen to be identical to a religious principle. Hence there are heresies in the modern world. The difference is that the standard account says "yes" where the non-standard one says "no". But the conceptual instrument on which they rely is the same. Because it is a blunt instrument, it produces the same kind of misjudgments and the same kind of inability to account for the difference between medieval and modern political thought.

4 There is yet another possibility that was popular among Catholic and romantically inspired historians during the nineteenth century, then fell out of fashion, but has recently had a revival: instead of blaming modern people for being just as barbaric as medieval people, you can praise medieval people for being just as enlightened as modern people. Look, for example, at Pennington, *Prince and Law*, and Pennington's teacher Tierney, "Origins of Natural Rights Language." This is an interesting reversal of what I have just called the non-standard account. Conceptually, however, the problems it poses are very similar to those of the non-standard account itself. Like the non-standard account, it erases the boundary between the middle and the modern period of history that is so crucial to the standard account.

If you should object that this is a caricature of existing views of the relationship between heresy and sovereignty, I would agree; of course it is a caricature. Every sensible person I know has doubts about the simple story of progress from the barbaric persecutions practiced by the medieval church in the name of faith to the enlightened forbearance of the modern state. And no sensible person I know maintains that heresies in the modern world cannot be distinguished from heresies in the Middle Ages.

Nonetheless, the caricature is justified. We may all know that it is a caricature. But I am not at all sure that we know how to replace it. One could add many finer points to the picture. One could soften the contrasts, expand the size of this essay to that of a book—or even many books—and transform it into something that could be called a history with more justice than the sketch I have just offered. But I doubt that any of that would replace the contrast between religious faith and secular truth as the chief means at our disposal for explaining what happened to political thought in the transition from the Middle Ages to modernity—and if it did, it would produce confusion. That seems to be our quandary: either we are stuck with caricature, or we reap confusion. {384 | 385}

How to get out of that quandary? Consider the possibility that the spheres marked by heresy and sovereignty are neither mutually exclusive nor identical. Consider the possibility that sovereignty ought to be regarded neither as a principle of secular truth nor as a principle of religious faith, but as a kind of heresy. Then consider the implications.

That there is something heretical about sovereignty is not difficult to show. Let me give you two examples. One comes from Bartolus of Sassoferrato (1313/14–1357), perhaps the greatest medieval interpreter of Roman law. Bartolus is especially interesting because he is well known to have been in the vanguard of those who were trying to conceptualize something like sovereignty for the Italian city-states and the kings of France and England as early as the first half of the fourteenth century. But there comes a moment when he confronts the question whether anyone may deny the right of the Roman Emperor to rule the entire world. His answer is that whoever did so

> would be a heretic, for he speaks against the determination of the church and the text of the Holy Gospel, where it says that "there went out a decree from Caesar Augustus that all the world should be surveyed," as you can read in Luke, chapter two. Christ himself thus recognized the emperor as lord.[5]

5 "Et forte si quis diceret dominum Imperatorem non esse dominum, et monarcham totius orbis, esset haereticus: quia diceret contra determinationem ecclesiae, contra textum Sancti

The other example comes from Pope Innocent X. In 1648 Innocent X had to decide whether he could approve the Treaty of Westphalia. {385 | 386} That treaty gave German princes as much sovereignty as they were ever going to enjoy, and it extended the same courtesy to Protestant and Catholic princes alike. Could the pope go along with that? Pope Innocent thought not. Why not? Because Protestants were heretics. Acknowledging the sovereignty of heretics was not among the courses of action he considered safe or sound. Hence he annulled the pertinent articles, explicitly on grounds of heresy—and in so doing effectively removed the papacy from participation in the European state system for a long time to come.[6]

In two important cases, one at the beginning of the early modern period and one towards its end, sovereignty was thus condemned as heretical. That, it seems to me, is a decent enough reason to regard it as a kind of heresy, but not, I hasten to add, unless we immediately go on to point out that it was a very peculiar kind of heresy indeed. It was heretical in that the will of the sovereign was obstinately and deliberately opposed to the dogma of the church. But it was peculiar in that it opposed only the reach of dogma, not its content, and that it ended up by confining dogma to the sphere of what we nowadays call 'the church' in contradistinction from 'the state,' not at all by replacing it with an alternative dogma. Sovereignty is rather like heresy never brought to completion.

Seen in this light, the relationship between sovereignty and heresy is ambiguous. But I think the ambiguity can be resolved by distinguishing three

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Evangelij, dum dicit, Exivit edictum a Caesare Augusto ut describeretur universus orbis, ut habes Luc. ij. c. Ita etiam recognovit Christus Imperatorem, ut dominum." Bartolus on Dig. 49.15.24, s.v. 'hostes,' nr. 7, *Opera*, 6:228ra. I am taking *forte* to go with *si quis diceret*. If it is taken to go with *esset haereticus*, Bartolus's claim would be more mildly put, but no less telling. I should add that interpreters of Bartolus are deeply divided over the question how to interpret his statements in favor of the emperor's right to rule the world, given his declarations that the Italian city-states are free to publish statutes on their own and that the king of France recognizes no superior. Compare, for example, David, "Contenu de l'hégémonie impériale," and Keen, "Political Thought," esp. 115–16, with Skinner, *Foundations*, 1:10, or Pennington, *Prince and Law*, 197.

6 Innocent X, "Zelo Domus Dei," in Coquelines, ed., *Bullarum collectio*, 6/3: 173–5. For details see Repgen, "Der päpstliche Protest." Repgen notes that the only major European powers not to sign the Treaty of Westphalia were the two that were the fondest of universal government: the papacy and the Ottomans. He also shows in marvelous detail that Innocent X's annulment was not at all inevitable. But even though popes more like Urban VIII could very well have postponed the day of reckoning indefinitely, I am not sure that they could have avoided it altogether. Innocent X's action may not have been inevitable, but it was temptingly plausible.

consequences that followed from the invention of the peculiar kind of heresy that we call sovereignty.

The first is familiar. I would like to call it the neutralization of religion. The medieval church had been well equipped to deal with heretics who claimed to have a grasp on some alternative religious truth. Sovereigns, however, made no such claims. They simply refused to stand for battle on {386 | 387} the grounds of religion. They stood for battle on the grounds of the particular territory they happened to control and the particular laws by which they aspired to control that territory—positive temporal laws, not eternal religious laws.[7] That was an enemy the church was not equipped to combat. From their point of view Bartolus and Innocent X were perfectly correct in their assessment of sovereignty. But the experience of a hundred years of religious war condemned their point of view to irrelevance. By the middle of the seventeenth century the choice seemed to be between continued support for religious truth as a foundation for politics, which meant war, and the replacement of religious truth with sovereignty, which meant peace. That choice was clear. As a result, religion was expelled from the realm of politics, and the very concept of heresy as an ingredient in the makings of political communities was effectively destroyed. By the eighteenth century, religion had been neutralized.

No one, I think, explained that kind of reasoning more succinctly than Jean-Jacques Rousseau in his *Social Contract*:

> All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should need neither government nor laws. There is undoubtedly a universal justice which springs from reason alone, but if that justice is to be acknowledged as such it must be reciprocal. Humanly speaking, the laws of natural justice, lacking any natural sanction, are unavailing among men. . . . So there must be covenants and positive laws to unite rights with duties and to direct justice to its object.[8]

The second consequence of the invention of sovereignty is not so familiar. But I think it is more important. I would like to call it the naturalization of religion.

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7 Jean Bodin was therefore only consistent in abolishing the distinction between moral and immoral governments as meaningless for political theory and asserting that sovereigns might very well be tyrants: "Yet the tyrant is nonetheless a sovereign, just as the violent possession of a robber is true and natural possession even if against the law, and those who had it previously are dispossessed." Bodin, *On Sovereignty* 1.8, ed. Franklin, 6.

8 Rousseau, *Social Contract* 2.6, trans. Cranston, 80–1.

For it seems to me that the same people who expelled religion from the sphere of politics reintroduced it in the realm of nature. {387 | 388}

For evidence, let me refer you back to the quotation from Rousseau that I just gave you. Rousseau asserts that "the laws of natural justice, lacking any natural sanction, are unavailing among men." That assertion is an article of faith if ever I saw one. To be sure, I know of no rational proof for the proposition that the laws of natural justice do enjoy a natural sanction. But neither do I know of any rational proof for the proposition that they do not. I am not even sure what the laws of natural justice say. I am sure that Rousseau does not prove his assertion; instead of offering proof, he offers an assumption. That assumption is that the realm of nature and the realm of human affairs are separated from each other in such a way that the laws that obtain in the one do not carry over into the other.

That assumption, it seems to me, is the religious foundation of politics in the modern world. Perhaps it is better called a revelation than an assumption.[9] It underlies any number of other basic distinctions that we are accustomed to take for granted, like those between mind and body, subject and object, faith and works, morals and politics, science and history, nature and culture, male and female, public and private, self and other. It is also constitutive of sovereignty, for it is only on the assumption that the laws of nature have no effect on human society that it becomes intelligible why we might need sovereigns who make purely positive laws in order to preserve human society.[10] Sovereignty

9 Rousseau was hardly the first or the most important recipient of this revelation. There is a famous statement in the fifteenth chapter of Machiavelli's *Prince* to rather similar effect. The categorical distinction that Luther drew between the kingdom of God and the kingdom of man belongs in the same context and one could very well make a case for adding Marsiglio of Padua to this list. Rousseau is useful because he lived towards the end of the historical developments that transformed this assumption from the outrageous heresy that it appeared to be to at least some of the more orthodox contemporaries of Marsiglio into a self-evident truth. Hence he was in a better position to state it succinctly.

10 It is telling, I think, that we use the same word to refer to the subject of the Cartesian *cogito*, the subject of scientific study, and the subject of a sovereign state. These are, respectively, the subject that practices science, the subject on which science is practiced, and the subject that allows itself to be kept in line by a sovereign ruler legislating rules of conduct that are, at bottom, arbitrary because science has not so far managed (and is now no longer expected) to accomplish what Descartes seems to have hoped it eventually would, namely, extend the success it enjoys in the study of nature by producing a scientifically grounded morality. Languages other than English make it more difficult to establish this point, but not at all impossible.

thus rests on foundations different from but no less religious than those of the medieval church. {388 | 389}

The third consequence follows directly from the first and the second. I would like to call it the blinding of the faithful. It is that the religious foundations of sovereignty are virtually impossible to recognize for modern people. Our historical experience has given us an example of what it means to have religion. The example is the religion we have neutralized. If you believe that you must be subject to the pope in order to go to heaven, that is religion. If you believe that the fundamental distinction in the world is between Christians and infidels, that is also religion. But if you believe that good citizens are subject to a sovereign state, that is not religion; that is common sense. If you believe that the fundamental distinction in the world is between mind and body, that is also not religion; that is reason.

We remember all too well the religion we have neutralized. But we have no eyes for the religion we have naturalized.[11] We have accepted the boundaries of nature as a matter of faith. We have not subjected them to examination, except in the narrow circles of professionals officially privileged to perform just such examinations and, of course, the not-much-wider circles of radicals, kooks, spiritualists, sectarians, anarchists, and other types of modern unbelievers whom we lack even the words to designate as anything other than dwelling beyond the limits of legitimate discourse.

Under modern circumstances it would therefore be a mistake to look for heretics in the area of religion. Religion is what we persist in calling the religion we have neutralized. But the religion that is {389 | 390} in effect today is

11 That may explain why there seems to be no good history of religion in the modern world—unless you take histories chronicling the multiplication of the several modern confessions or the history of secularization to be histories of religion. Expecting a good history of the modern religion from a modern historian is about as fair as expecting a good history of medieval Christianity from a medieval theologian. How can you write a history of "the truth"? Here we may be imitating our medieval forebears. Having neutralized paganism, they, too, were convinced that the religion to which they subscribed was actually a rational truth of nature, though they were less confident than we are about the ability of human beings to identify that rational truth without divine assistance. Thomas Aquinas, *Summa Theologiae*, I–II, q. 91, is quite clear about this. To be sure, he distinguishes divine law from eternal law. Divine law is what you find in the Bible. Eternal law is the law in the mind of God. But there is no substantial difference between them, and both are equally rational. The difference is merely that God has chosen to reveal one part of the eternal law to human beings—what he calls the divine law—but not the other part. See Thomas Aquinas, *Treatise on Law*, 148–84.

the one that was naturalized in the early modern period, and we do not call it religion. Modern heretics are therefore far more likely to be found among the ranks of those who doubt or violate the boundary between nature and culture that is the chief article of faith in the modern religion. Witches were the first and may well remain the most telling example. There are good reasons why the persecution of witches overlapped with the age of religious wars; why intolerance of "unnatural" practices hardened as tolerance for religious nonconformity grew; and why persecutions of people perceived to be endangering the various manifestations of sovereignty can still be called "witch-hunts." These are related aspects of a single process. The same Jean Bodin who invented sovereignty and redefined the relationship between history, law, and nature published one of the most astonishing attacks on witchcraft to appear in the sixteenth century.[12] Interpreters have commonly regarded it as puzzling that a thinker of such stature should in this instance have proved himself so sadly superstitious.[13] I think he merely proved himself consistent, which may help to explain why today's debates about homosexuality, abortion, and the relationship between race and intelligence are proving to be so peculiarly recalcitrant to any rational resolution.

We are slowly beginning to become conscious of these matters. That is a cause of some delight for an early modern historian like myself, who believes that a better understanding of early modern history cannot but increase that consciousness. But the delight is not altogether unqualified. It is worth remembering that there once were narrow circles of medieval professionals who enjoyed a privilege of examining the boundaries of the faith precisely analogous to the privilege enjoyed by their modern successors of examining the boundaries of nature. The age of religious wars began when one of those examinations (intended to deal with indulgences, announced in Wittenberg, composed in Latin) unexpectedly caught the popular imagination. The result was the violent disintegration of a social and {390 | 391} political order. It is a sobering thought that something like that could happen to us. Perhaps Francis Fukuyama has a point after all.[14] Perhaps we are facing the end of history.

12 Bodin, *Démonomanie des sorciers* (1580).

13 See Janson, *Jean Bodin*, and Lange, *Untersuchungen*. Cf. Febvre, "Witchcraft."

14 Fukuyama, *End of History*. Briefly stated, Fukuyama argues that the modern, Western, liberal state is the best form of social and political organization known to man that can actually be put into effect, and that the collapse of communism has proved it to be just that. It can therefore be expected to rule indefinitely. That would indeed put an end to history, except in the sense of working out the details. It is therefore worth pointing out

Not the one he had in mind, but the one that would follow from the disintegration of the modern social and political order in wars, not of religion, but of nature.

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that a similar position could just as plausibly have been defended by a prophet living towards the end of the fifteenth century. As B. Moeller, "Piety in Germany," has been at pains to impress upon historians, the period just before the Reformation was not only a time when popular identification with the established church ran, by all reliable measures, at an all time high, but also the first time in medieval history when not a single major heretical movement was threatening the established church. At that moment it could very well have seemed as though the steam had gone out of heresy and that the Roman Catholic Church had won for good. At the very same moment, however, witch trials were beginning to replace trials for heresy, and a generation later the Reformation was on the scene. There is no inherent reason to be sure that what looks to some like the decisive conquest of the world by the modern nation state could not similarly turn out to be the prelude to the distintegration of the faith by which that state is inspired.

CHAPTER 17

Empire the Modern Way

The purpose of this paper is to examine an assumption that underlies much modern scholarship on empire, namely, that empire rests on force.[1] My thesis is that this is too limited a point of view. Empire need not rest on force, at least not exclusively, and especially not if it aspires to universality. Indeed, to the extent that universal empire is conceivable at all, it must rely on something else. I would therefore like to draw a distinction between two different types of empire: empire that rests on force and empire that rests on something else, as yet to be defined. I shall call the former empire the modern way and the latter empire the ancient way. That is of course too simple, but it will help to lift the fog. Once we can see more clearly, it will be possible to complicate the picture without distorting it again. Let me just add one caution: empire the ancient way is not to be confused with empire the ancient Roman way.

Let me explain how I arrived at these reflections. I started with an observation: contemporary scholarship seemed strangely unable to come to proper terms with universal empire. It was as though the scholarship could take no look at universal empire at all without assuming that it rested on false ideas and illegitimate foundations. I was not particularly disconcerted by the dismissal of universal empire by those who disapprove of it as illegitimate outright. That universal empire conflicts with modern principles of sovereignty and liberty is a familiar position. That historians living in the modern world should therefore commonly disparage or neglect universal empire is not particularly difficult to understand.

The treatment universal empire received from its friends was intellectually more intriguing. I thought that their insistence on the significance of empire for understanding medieval and early modern politics was on the mark. Yet they did not seem able to escape from the hegemony of their opponents. What was the reason? Was it a kind of narrow-minded pigheadedness preventing

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1 The literature is vast. For an authoritative study see Koebner, *Empire*. For a selection of more recent views see Armitage, ed., *Theories of Empire*. Especially pertinent in the present context is Muldoon, *Empire and Order*.

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modern historians from appreciating the attractions of universal empire? I doubted that. Pigheadedness is scarcely so unevenly distributed. Was it a {74 | 75} certain romantic quality in arguments that seemed to deny the very reality of universal empire they were supposed to demonstrate? I noted that universal empire was described as a phantom and a mystical idea.[2] I found a brilliant insight articulated with ironic clarity in the *Persian Letters* of Montesquieu. Rica, writing home to Persia about what he calls the Germanic Empire, points out that

> it is only a shadow of the first Empire, but I believe it is the only power ever on earth not to be weakened by divisions; the only one, I further believe, strengthened in proportion as it loses land, and which, slow though it is to profit by success, becomes invincible in defeat.[3]

Clearly the view of empire as a phantom was something more than a misleading characterization of its political reality. Clearly it carried deep historical conviction, imbued with real historical significance. Yet just as clearly it seemed incapable of putting the political reality of universal empire into convincing language.

This was a puzzle that I wanted to solve. I will not claim that I have solved it. But I have an idea for a solution that I would like to share with you. I found the key in a famous passage in the writings of Bartolus of Sassoferrato (1313/14–1357), the well-known late medieval commentator on Roman law.[4] Bartolus maintained that even those Italian city-states who were not obliged to obey the emperor because of certain privileges they had received from him did

2 For an influential formulation see Yates, *Astraea*, 1–2: "The transitory and unreal character of the empire of Charles V is the aspect of it usually stressed by modern historians. Whilst not denying its unreality in the political sense, it is the purpose of the present essay to suggest that it is precisely as a phantom that Charles's empire was of importance, because it raised again the imperial idea and spread it through Europe in the symbolism of its propaganda, and that at a time when the more advanced political thinking was discrediting it. . . . These revivals, not excluding that of Charlemagne, were never politically real nor politically lasting; it was their phantoms which endured and exercised an almost undying influence." Concerning the empire of Constantine the Great, Yates maintains that "it would seem that what is developing here is a species of secular mysticism, or mystical secularism, with the Emperor as a kind of temporal Christ, redeeming man back to the Earthly Paradise with his justice, bringing in a full golden age with his imperial order." Ibid., 8.

3 Montesquieu, *Persian Letters*, nr. 136, trans. Healy, 231.

4 See Kirshner, "Bartolo da Sassoferato."

nonetheless belong to the Roman people and had to acknowledge the emperor's right to rule the world. He went on to maintain that

> the same is true of those other kings and princes who deny that they are subject to the king of the Romans, like the king of France, the king of England, and others like them. For so long as they admit that he {75 | 76} is universal lord (*dominus universalis*), they do not cease to be Roman citizens, for the reasons given above, even though they may remove themselves from his universal lordship (*dominium universale*) by virtue of privileges, prescription, or other such reasons.[5]

This passage raises a not inconsiderable difficulty. What on earth can Bartolus have had in mind when he maintained that the king of France was fully entitled to remove himself from obedience to the emperor's universal lordship just so long as he acknowledged that the emperor was universal lord? There seems to be a flat-out contradiction here: either the emperor really is ruler of the world, and then the king of France needs to obey him; or the king of France does not need to obey him, but then the emperor is obviously not ruler of the world. Yet this is not how Bartolus appears to view the matter. He insists that the king of France does not need to obey the emperor and yet insists as well that the emperor is truly lord of the world. Indeed, he claims that rulers who

5 "Et idem dico de istis alijs Regibus et principibus qui negant se esse subditos Regi Romanorum, ut Rex Franciae, Angliae, et similes. Si enim fatentur ipsum esse dominum universalem, licet ab illo universali dominio se subtrahant ex privilegio, vel ex praescriptione, vel consimili, non desinunt esse cives Romani, propter ea quae dicta sunt. Et secundum hoc quasi omnes gentes, quae obediunt Sanctae matri Ecclesiae sunt de populo Romano." Bartolus on Dig. 49.15.24, s.v. 'hostes,' nr. 6, *Opera*, 6:228ra. ("I maintain that the same is true of those other kings and princes who deny that they are subject to the king of the Romans [i.e., the emperor], like the king of France, the king of England, and others like them. For so long as they admit that he is universal lord, they do not cease to be Roman citizens, for the reasons given above, even though they may remove themselves from his universal lordship by virtue of privileges, prescription, or other such reasons. By the same logic virtually all people who obey Sacred Mother Church belong to the Roman people.") These words are taken from Bartolus's commentary on the word *hostes* ("enemies") in a passage of the *Digest* (the largest and most important of the four volumes constituting the body of Roman Law issued by Emperor Justinian in the sixth century CE) that deals with a distinction between enemies of the state and mere robbers or criminals. The standard edition of the *Digest* is Justinian, *Digesta*, ed. Theodor Mommsen. There is an English translation, *Digest of Justinian*, edited by Alan Watson.

deny the emperor's right to rule the world fall into heresy even if they need not obey the emperor anyway.[6] How can this be?

The answer to this question came in two separate installments. First came the recognition that for Bartolus the right to rule the world did not entail the right to rule any particular part of the world. Bartolus uses a shepherd and his flock as an analogy. The {76 | 77} shepherd has a right to dispose over the flock, but not over the sheep. The flock belongs to the shepherd; the sheep, however, belong to those who hired the shepherd to tend the flock. In just that way Bartolus thought the world, like a flock of sheep, belongs to the emperor, but the parts of the world do not.[7] The king of France was therefore free to rule France as he pleased, but only France, and only so long as he acknowledged that the emperor had the right to rule the universal flock. The emperor, meanwhile, had the right to rule the world, but only the world, and not France. His lordship was truly universal, but only universal. In that way the apparent contradiction could be resolved.

Yet this was obviously only half an answer. It left me in the dark about the difference between ruling the whole and ruling the parts, and it raised

6 "Et forte si quis diceret dominum Imperatorem non esse dominum, et monarcham totius orbis, esset haereticus: quia diceret contra determinationem ecclesiae, contra textum Sancti Evangelij, dum dicit, Exivit edictum a Caesare Augusto ut describeretur universus orbis, ut habes Luc. ij. c. Ita etiam recognovit Christus Imperatorem, ut dominum." Bartolus on Dig. 49.15.24, s.v. 'hostes,' nr. 7, *Opera*, 6:228ra. ("And if someone were to say that the lord emperor is not lord and monarch over the entire world, he would be a heretic, for he speaks against the determination of the church and the text of the Holy Gospel, where it says that 'there went out a decree from Caesar Augustus that all the world should be surveyed,' as you can read in Luke, chapter two. Christ himself thus recognized the emperor as lord.")

7 "Ex hoc nota modum pronunciandi et exequendi, quando petitur universitas rerum, quod licet iudex pronunciet gregem esse meum, tamen restitutio fiet mihi detractis capitibus alienis. Pro hoc ego sum consuetus dicere in prima constitutione huius libri, ut cum Imperator sit dominus totius mundi. Et glossae dicunt eum dominum quo ad protectionem: quia cum alij sint domini singulariter, plures non poterunt esse domini in solidum. Ego quod Imperator est dominus totius mundi vere." Bartolus on Dig. 6.1.1, s.v. 'per hanc autem actionem,' nrs. 1–2, *Opera*, 1:172^{rb}. ("Now consider the method of pronouncing and executing judgment in a case involving [the vindication of a legal claim to] a certain whole [as for example a flock of sheep]. In a case like that the judge may pronounce that the flock belongs to me, but the flock will nevertheless only be returned to me after any individual heads belonging to someone else have been taken away. This is the reason why I am accustomed to say in my commentary on the constitution *Omnem* [i.e., the second prefatory constitution to the *Digest*] that the emperor is truly lord of the whole world, even though the glosses say that he is lord only insofar as he protects everything, since different people cannot have complete control over the same thing.")

troubling questions about shepherds ruling flocks in which there are no sheep. I owe the other half to the work of my good friend and colleague Tamar Herzog. Prof. Herzog has recently published a book on citizenship in early modern Spain and Latin America.[8] A central thesis of her book is that citizenship (*vecindad*) in early modern Spain rested on grounds entirely separate from obedience to the king. Citizenship was the right of those who belonged to a community (*vecinos*) to be acknowledged as members of that community. A good analogy for citizenship defined that way is membership in a linguistic or cultural community. Speakers of English, for example, may be considered citizens of English, as it were, not because they obey any particular ruler, state, or institution, but because they obey the rules of the language. Those rules are basic and powerful, as anyone who breaks them will soon enough find out. They guarantee the possibility of communication and constitute the ground on which the members of the community can meet. But they do not compel any one to say {77 | 78} any particular thing; much less are they enforced by any central agency. So long as people speak the language, they will be recognized as citizens of English, no matter what they say or whom they disobey.

On this analogy, empire the ancient way embodied the conviction that all human beings are members of one cultural community, never mind their many different ways of life, and never mind the many other groups—such as cities, nations, states, and families—with which they may identify. The unity of this community does not consist of what its members say or do, but of the language and the culture that they share. Perhaps that is a mystical idea, but no more so than the idea of any linguistic or cultural community.

Two factors thus go into making empire the ancient way. One is the point that Bartolus makes explicit: empire is universal, but only universal, and not to be confused with control over any particular part of the world. The other is a point that Bartolus takes for granted: empire is what we would call a culture, a civilization, perhaps even a church, but definitely not a state.

It seems to me that this analysis accomplishes three purposes: first, it removes empire the ancient way from the realm of mystical ideas; second, it helps to understand why empire the ancient way declined and fell in late medieval and early modern times; and third, it leads to a better grasp of empire the modern way than we have had so far. Let me take up each point in turn.

First, we can now assign a reasonable meaning to the emperor's alleged right to rule the world. Acknowledging that right was meant to signify membership in a community, namely, the Roman people. Of course that community was not so much defined by language as by law. But neither law nor language

8 Herzog, *Defining Nations*.

depended for their success upon subjection to the force of a central authority. In this community law and language were transparent in a way such that no force was needed to procure obedience. Obedience rather followed from understanding—by no means a far-fetched possibility if one remembers that, etymologically speaking, obedience means first of all lending one's ear, and only secondarily doing what one has been told to do. Universal empire rested on the conviction that culture and politics were seamlessly joined together by understanding.

The function of the emperor was therefore neither to enforce obedience nor to command any particular kind of action, and his empire did not consist of armies or his ability to make his will obeyed. The emperor's function rather was to guarantee the unity of {78 | 79} language and law—of culture and politics—and his empire consisted of jurisdiction, what Bartolus called the power of law (*potestas iuris*), and especially the power of legislation, which he defined as the summit of jurisdiction. Of course laws can be broken and may have to be enforced; of course the emperor might be called upon to put the law into execution. But since disputes are logically inconceivable outside some common linguistic ground, that was a different and entirely subordinate kind of responsibility.[9] First and foremost the emperor was judge and legislator, not executioner. His rule assured that meaning could be transmitted without loss of understanding and that political obedience and disobedience were equally founded on the truth. Disobedience was no more incompatible with imperial rule than saying "no" is incompatible with speaking English.

Second, this helps us understand why empire the ancient way declined and fell. The reason is that language is never entirely transparent and politics never completely fused with culture. This is of course one of the central tenets of Christianity. Christ is the Word; Christ is the truth. Indeed, Christ is the truth made flesh and promises a kingdom in which only the truth will rule. But Christ's kingdom is not of this world, and communion is not communication. In this world, to quote St. Paul, the truth is not communicated "face to face,"

9 Bartolus defined legislation as the first, and the right of the sword (*ius gladii*) as the second in a total of six degrees of "pure empire" (*imperium merum*); Bartolus on Dig. 2.1, *Opera*, 1:45va. He also explicitly rejeced the identification of "pure empire" with the ability to inflict punishment on the grounds that "pure empire" included the power to make laws: "Iac. de Are. fuit ille qui primo incepit ponere diffinitionem, et dicebat sic. Merum imperium est iurisdictio severioris ultionis inferendae, publicam utilitatem respiciens. Haec diffinitio non placet. Nam constat quod condere legem est meri imperij." Bartolus on Dig. 2.1.3, s.v. 'imperium,' nr. 6, *Opera*, 1:48^{rb}. ("Iacobus de Arena was the first to assert that 'pure empire' consists of jurisdiction over matters of capital punishment, where public utility is at issue. That definition is not acceptable, because it is certain that 'pure empire' includes legislation.")

but only "through a glass, darkly."[10] The point of the famous line to "render unto Caesar the things which are Caesar's" is not that Caesar has a right to tax.[11] It is that Caesar has no right over the Word. Christianity stresses that politics and culture are heterogeneous. It does so in the doctrine of the Trinity itself. The Father and the Son are equally divine, but separate persons. Thus Caesar has no right to rule the true community because no such community exists on earth. {79 | 80}

This is precisely what Bartolus denied. For Bartolus the world did constitute a true community, embracing earth and heaven. That is why he defined the right to rule the world as property and went so far as to suggest that an emperor from whom the right to rule the world was taken away would be entitled to sue for its return under the Roman legal action of *vindicatio rei*.[12] His point was obviously not that there exists a court in which the emperor could sue. His point was that the right to rule the world is not political but cultural in nature. Thus Caesar is a rather different kind of ruler from the universal emperor whom Bartolus had in mind, and rather more like the emperor with which I started, the kind whose rule relies on force.

It is of course debatable how central the heterogeneity of politics and culture is to Christianity. There have been forms of Christianity in which it does not seem to matter much, and there may be religions other than Christianity in which it matters more. But there can be no doubt about one thing: the heterogeneity of politics and culture is like a genie that no emperor can put back in the bottle once it has managed to get out. An emperor whose right to rule the world has been defied by the assertion that culture transcends his grasp is caught in a dilemma. If he gives in, his enemies can take his empire away, and if he fights, he merely proves that his authority rests, not on the truth, but on the force of arms. His choice is between hiding inside Kyffhäuser—the legendary

10 "For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known." 1 Cor. 13:12, King James Version.

11 "And he saith unto them, Whose is this image and superscription? They say unto him, Caesar's. Then saith he unto them, Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." Matt. 22:20–21, KJV.

12 "Nec obstat, quod alij sunt domini particulariter, quia mundus est universitas quaedam: unde potest quis habere dictam universitatem, licet singulae res non sint suae. Unde si alius teneret mundum, ipse Imperator posset vendicare." Bartolus on Dig. 6.1.1, s.v. 'per hanc autem actionem,' nr. 2, *Opera*, 1:172^{rb}. ("It is no valid counterargument that other people are lords over individual things, because the world is a kind of whole. Hence someone can be said to have this whole [like a lord], even though the individual things do not belong to him. If someone else were to hold the world, the emperor could therefore vindicate his claim [in a court of law].")

mountain where the true emperor is said to bide his time and whence he will eventually return in order to restore the empire—or turning himself into the ruler of a state. If the true emperor goes into hiding, his empire falls to his enemies; if he becomes the ruler of a state, it falls to himself. In either case the heterogeneity of politics and culture is confirmed. Empire the ancient way thus suffers from a congenital deficiency. Precisely because it claims universality, it is incapable of self-defense. Once the taboo on its authority is broken, empire the ancient way can only shrink. {80 | 81}

Third, I think this leads to a better grasp of empire the modern way. So far I have defined empire the modern way as founded on domination by some central authority, and I have drawn a sharp distinction between that kind of domination and universal empire. I did so for the sake of clarity. But leaving it at that would be a real mistake. There are good reasons for making that mistake. They arise from the circumstances under which early modern states established their right to sovereign independence from imperial control. Sovereignty originated in opposition to universal empire. It was defined as the exclusive, undivided, and territorially limited power of a sovereign ruler to impose his will and to demand unconditional obedience. This view was justified by drawing on ancient Roman views about *imperium* that were notoriously difficult to reconcile with jurisdiction and seemed to prove that Bartolus was fundamentally mistaken when he defined empire as a kind of jurisdiction.[13] Rhetorically speaking, that was a masterstroke. But we need not believe the counterfeit history of ancient origins designed by early modern humanists to liberate early modern rulers from universal empire and endow them with territorial sovereignty. In historical reality, sovereignty is not derived from ancient Rome at all. On the contrary, it is a direct descendant of universal empire. Its essence consists of the same legislative power that Bartolus ascribed to the emperor. That power is quite different from Roman *imperium*. It is a legal power, as opposed to a military one; it governs all subjects equally; and it does not apply itself directly to particulars but rather carefully distinguishes between laws (matters of legislation) and privileges or decrees (matters of execution).

13 Early modern humanist historians of law never tired of pointing out that the medieval etymology of *iurisdictio* was wrong; see Denis Godefroy's standard gloss on the title of Dig. 2.1, *De jurisdictione*, in Godefroy, ed., *Corpus iuris civilis* (1688), 35, note a: "Fallitur Accursius hoc titulo dum notat a ditione Iurisdictionem esse, cum sit a jure dicundo." ("Accursius's gloss on this title is wrong to note that *iurisdictio* [jurisdiction] is derived from *ditio* [dominion], for in fact it is derived from *ius dicere* [to declare what is right].") It followed that empire (*imperium*) could not be construed as a species of jurisdiction (*iurisdictio*).

On these points there is agreement among theorists of sovereignty as different from each other as Jean Bodin, Thomas Hobbes, and Jean-Jacques Rousseau. Bartolus had it exactly right: a sovereign ruler is emperor in his kingdom. But modern theorists of politics cannot afford to say so because, if they did, they would lay bare the dirty secret of modern sovereign states: that they aspire to the same coincidence of culture with politics and aim at the same kind of universality as empire the ancient way. {81 | 82}

Thus empire the ancient and empire the modern way are complementary forms of one and the same political reality. Both seek to reconcile culture with politics, force with reason; they merely start from opposite directions. Empire the ancient way consists of a cultural community in search of political unity. The more the emperor insists on force in order to procure obedience, the more his power shrinks until he is compelled to choose between retreating into the legendary mountain or turning himself into a territorial ruler. Empire the modern way consists of a territorial ruler in search of cultural significance. The more he reaches for cultural significance, the more he is compelled to choose between self-annihilation and conquering the world. Empire the ancient way lasts only as long as it can shrink; empire the modern way lasts as long as it can grow.

Modern historians should therefore not be criticized for whatever romantic longing their writings may display, nor should they necessarily be blamed for their satirical dismissal of empire the ancient way. The longing and the dismissal reflect the same historical reality. Dante and Bartolus themselves were full of romantic longing for an empire that was shrinking fast. What was the papacy's unwavering support for territorial rulers if not the most effective satire to which empire has ever been exposed? Empire the ancient way has always been something of an illusion, and empire the modern way is at the very least as old as the request to give to Caesar what is Caesar's. States claiming universality are bound to be defeated. But that defeat does nothing more effectively than to establish the liberty of culture from political control. That, I believe, is at the heart of Montesquieu's ironic observation that the Germanic Empire

> is the only power ever on earth not to be weakened by divisions; the only one, I further believe, strengthened in proportion as it loses land, and which, slow though it is to profit by success, becomes invincible in defeat.[14]

14 Montesquieu, *Persian Letters*, nr. 136, trans. Healy, 231.

CHAPTER 18

The Limits of History in Brief

The purpose of this essay is to state in brief what I have written at much greater length in *The Limits of History*. I would prefer you read my book. Yet the book is long, and life is short, and it would neither be honest nor polite not to acknowledge the pleasure this author takes in being given another venue for his ideas. Moreover, authors generally like to hear informed responses of the sort this essay is intended to provoke, and readers have a right to ask the author just what he had in mind.

Let me divide my answer to that question in two parts. First, I will present the main points I tried to make in *The Limits of History*; then I will explain the method I used to get those points across. First *what*; then *how*.

1 What?

The Limits of History deals with history in the sense of a certain kind of knowledge—knowledge of the past—as well as the techniques by which such knowledge can be gained and the activities required to that end. It makes three basic points. First, history is not as innocent as it appears to be. It is not merely a form of understanding, but also a form of self-assertion. As such, it is tantamount to taking sides and inseparable from political activity, at least political activity of a certain kind. Second, history's most important function—the function that makes it inseparable from political activity—is to remove the possibility of doubt from certain elementary assumptions that tell us who we are, what we can do, and what the world is like. The knowledge of the past that history provides is merely a means towards that end. Third, ever since the purpose of history came to be identified with the pursuit of knowledge of the past as such—Ranke's *wie es eigentlich gewesen*—the means and ends of history have been confused. That has cast growing doubt on both. As a result, the ability of history to furnish adequate knowledge of the past as well as its ability to remove the possibility of doubt from certain elementary assumptions have been impaired. Let me take up each point in turn.

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First, we tend to think of history as nothing other than a form of knowledge. The value of that knowledge is debated among humanists, historians, philosophers, social scientists, natural scientists, and other kinds of people. Some think it is essential to the survival of civilized society; others, that it is a kind of unnecessary frill. But there seems no dispute at all that history is harmless in itself. Harmful are only the lack of history, the misrepresentation of the past, the ignorance and lies that history is intended to correct. Everyone agrees that lies about the past can be the source of grave injustices to living human beings and to their memories. Historians spend their lives in libraries and archives in order to prevent that sort of harm. They lie awake at night worrying if they have missed important evidence or misinterpreted its meaning. But so far as I can tell, the sleep of historians is never once disturbed by the possibility that they might get their history right. In that regard the conscience of history is completely clean.

This seeming innocence of history is probably its most seductive quality. It allows historians and their readers to go about the business of gathering knowledge of the past without having to ask themselves whether their business may not in some important way involve them in a cause they might not like at all if they knew better what it was. History calms the mind; it has a soothing function. It issues safe-conducts to passengers through time by drawing a firm line between the present and the past: that was then, and this is now. What was then is past—dead and gone. It happened, that much is true. But now it can no longer pose a threat, nor can it help in any way. The present and the future may worry or excite us, as the case may be. The past does not, except to the extent that we have not yet understood it properly. It lies still, just waiting to be known. Its stillness gives us the confidence we need in order to confront the future and make our fortunes and ourselves. Precisely because it turns attention away from here and now towards the stillness of that past, history assures us that we are free and independent agents with the ability to shape our fate, the obligation to act on that ability, and responsibility for the consequences.

History thus is not innocent at all. It is more than a form of knowledge; it is a form of political activity. It upholds a certain view of order and is effectively designed to defeat alternatives that could be taken up in lieu of history. Take, for example, providence. Providence teaches that everything happens by God's design. God is the only agent; even the Devil is but God's instrument. When human beings act, their actions are the battleground on which a cosmic drama can unfold. {5 | 6} Yet that view conflicts with history. In history people act, not God. History leaves no room for providence, except as a belief that certain people used to hold and other people hold today. History cannot allow providence to enter into its own array of explanations without turning from a kind

of knowledge into a kind of religious faith. History must hold that people who believe in providence deceive themselves about what really happens; what really happens is that they project their actions on some imagined deity and thereby, perhaps unwittingly, absolve themselves from a responsibility that is essentially their own.

Another alternative is custom. If providence displaces agency from individuals to God and the Devil, custom replaces agency with imitation. Agents who act from custom do not really act at all. They merely imitate. They follow customs not of their own design, they bear no individual responsibility, and they are not really free. They simply follow an example. Of course, they need to think about their actions, and sometimes they need to choose. But their thinking and their choices are contained within the limits established by the example of elders and superiors. Where custom is the ground of action, there is no room for individual liberty or for the line dividing the present from the past. Custom straddles the ages and suspends individual autonomy.

History can therefore not give room to custom any more than it can give to providence. It can treat custom only as an object of historical analysis. It can of course allow that human beings act by following examples. But it insists that in so doing human beings act. They exercise a choice. Perhaps they bow to elders, ancestors, and rulers; perhaps they bow to social forces beyond their comprehension. But if they so desired, they could act differently. From the perspective of historians, examples set by superiors and elders do not in fact explain why someone acts in one way rather than another. Nor is custom immemorial at all. It was created by individuals, and it is constantly being recreated. If history were to endorse belief in custom, it would have to abandon original research and be content to copy the works of ancient masters. From a historical perspective, belief in custom, like the belief in providence, can only amount to a kind of false consciousness. The consciousness is false because it conceals the agent's agency.

I do not mean that history is nothing but a form of political activity. There is a difference between studying documents and seeking power. Nor do I mean that history is political because historians are inevitably biased in favor of one or another party (which of course they are). Least of all I mean that history is political because it does, or ought to, deal with politics (which it by no means needs to do). I rather mean that the dispassionate study of the past as such, quite irrespective of the results to which research may lead, serves to confirm a certain view of what human beings and their relationships are like. To study history in order to produce an adequate account of the past is in and of itself to take a stand in favor of individual autonomy against all other possibilities, including, but by no means limited to, providence and custom. History as a

form of political activity is at its peak not when it is biased or focused on politics but, quite the opposite, when it succeeds in eliminating every last trace of bias and extending its understanding to all areas of life.

Second, the most important function of history is to remove the possibility of doubt from the assumption that we are free and independent agents of the kind that I have just evoked. History fulfills that function by making an intellectual move that seems so obvious and simple as to permit no doubt about its justification. When asked to explain the meaning of some piece of writing from the past or, for that matter, some other kind of object (which is potentially to say, any piece of writing and any kind of object), history does not immediately answer, but insists that something else needs to be done before an answer can be given. What is it that must first be done? The piece of writing (or the object) must first be placed into the context of its time and place. Only thereafter is it possible to understand its meaning.

To make this claim is to assert a fundamental principle. The principle is that the materials in front of us are to be taken as sources of information about the past. They must be viewed as traces of something someone did or thought at some specific time and place that cannot be correctly understood unless the circumstances of that time and place are reconstructed first.

To say these things is at one and the same time to say that there exists a definite connection between the evidence in front of us and the past person whose circumstances we seek to determine. The link consists of that past person's responsibility for the evidence. That person's responsibility is the sole ground on which it is possible to use the materials in front of us as sources of information about that person's time and place. If Paul could not be held responsible for having written the letter to the Romans—if the letter to the Romans were merely a copy of some ancient practice, merely the outcome of some chain of physical events, merely God's word to Man spoken through his apostle—the letter to the Romans would tell us nothing specific about the state of mind in which Paul wrote, much less about the circumstances of his time and place. If—the god of history forbid—we could not attribute the evidence to some specific agent acting at some specific time and place, our historical machine would spin its wheels in vain.

Thus, in the very act of demanding that sources must be interpreted according to the context of their time and place, history asserts that sources reflect the thought, action, or creation of some individual agent who can be held responsible for what he thought, did, or made at some definite point in past time and space, because he was at liberty to think, do, or make something else. History does not assert these things by saying they are so. It rather asserts them by engaging us in an activity that makes no sense unless their truth can

be assumed. It limits our imagination to a point at which alternatives can be ruled out by definition, as opposed to ruling them out by reason or experience. Ruling out such alternatives is history's most important function. The knowledge history draws from the analysis of evidence in terms of time and place is merely a byproduct picked up along the way, a necessary means without which history could not achieve its ends.

Thus history removes the possibility of doubt from the belief in individual liberty by something like a combination of ritual and taboo. The taboo consists of the prohibition on anachronism. What the taboo prohibits is any form of understanding that is not mediated by historical considerations. The ritual consists of the turn to the sources—*ad fontes*, as the humanists once used to say—in order to ascertain the context from which a mediated understanding is to be obtained. Each time that turn is made, someone is being held responsible. Each time someone is held responsible, the liberty of individual agents is reaffirmed. The ritual is constitutive of history. The knowledge to be expected from the performance of the ritual is not. That is the reason why the perpetual failure of historians to achieve an adequate representation of the past amounts to no valid argument against the {6 | 7} utility of history at all. It rather constitutes an eminently useful spur to resume the search for knowledge about the past, repeat the ritual, and thereby reaffirm the principles that history is consecrated to uphold.

Professional historians accordingly resemble priests who minister in the religion that governs the modern world. They are experts trained in practicing a sacred art. They know how to draw liberty from reading ancient texts as monks once drew salvation from reading Holy Scripture. As monks looked forward to the life to come, historians look forward to adequate knowledge of the past. By writing well-researched histories, they teach their reading flock how to maintain the faith, and they administer the sacrament of penance before the altar of liberty by taking confession from the past and granting absolution to the future. They exercise the care of souls for people who have grown unable or unwilling to follow providence or custom.

Third, ever since the purpose of history was identified with the pursuit of knowledge, the ends and means of history have been confused. That has cast growing doubt on both. In early modern times, history was better placed. By 'early modern times' I mean the period from, roughly speaking, the conflict between Pope Boniface VIII and King Philip IV in the early fourteenth century down to the dissolution of the Holy Roman Empire in the early nineteenth century. What gives unity to this long stretch of time from the perspective adopted here is that it witnessed a protracted battle between two hostile parties. One party thought anachronism was quite right; the other party thought that it was

wrong. The former was led by popes and emperors who claimed the right to rule the universe. The latter was led by princes, humanists, and reformers who advocated sovereignty for states (monarchical no less than republican) and moral autonomy for individuals acting from principles of conscience (subjects no less than citizens). The former rested their case on anachronistic interpretations of the Bible, Roman law, and canon law. They saw themselves as rulers of one and the same Roman Empire that had been founded by Emperor Augustus at the birth of Christ—the last of four world monarchies, which would not end until the end of time. The latter rested their case on historical interpretations of the same documents—the Bible, Roman law, and canon law—and they replaced the history of four world monarchies with the familiar succession of three great periods: antiquity, the Middle Ages, and the revival of ancient arts, politics, and faith with which the modern world announced its beginnings in Renaissance and Reformation.

During those centuries, history served as a weapon against a certain form of government: Marsiglio of Padua used it precociously in order to deny that the New Testament supported papal primacy; Lorenzo Valla used it to prove that the decretals collected by St. Isidore and the Donation of Constantine were forgeries; John Colet pointed out that St. Paul's injunction to obey the powers that be for conscience's sake was merely meant to reassure the Roman Emperor that Christians posed no threat to his authority; Erasmus drew attention to the fact that *ecclesia* does not mean 'church' but 'congregation'; Luther pronounced the Roman Empire dead and gone; Alciato, Budé, and Cujas turned Roman law into a subject of historical analysis; and Hermann Conring reduced the right of the Roman Emperor to rule the world to historical absurdity. The Bible was never historicized to the same degree as Roman law, and the papacy is still alive and well. Yet even so it has long since become impossible to quote a verse from Scripture about two swords (Luke 22:38) as proof for theories of papal supremacy. By the middle of the seventeenth century history had done a lot of work. The papacy's annulment of the Peace of Westphalia could safely be ignored, and not much later the Holy Roman Empire fell to Napoleon.

Throughout early modern times the difference between the knowledge that history produces and the purpose that it serves was reasonably clear. That changed as soon as the historical perspective won the game. Once universal hierarchy had been eliminated from the range of politically legitimate possibilities, the meaning of history was severed from the context in which it had arisen and identified with the pursuit of knowledge of the past as such—Ranke's *wie es eigentlich gewesen*. As a result history entered a vicious cycle. Knowledge of the past began to grow by leaps and bounds and it has not yet stopped growing. But since that knowledge was isolated from the context in which it had

taken shape, it was disabled from preventing doubts about the assumptions on whose truth its meaning rested. Such doubts immediately gained strength. They were particularly clearly stated by critics on the Left (Marx) and Right (Nietzsche) who were not historians themselves and therefore better placed to recognize that history was losing meaning. Historians responded by improving their knowledge of the past—only to find their knowledge perpetually failing to catch up with their doubts. By now, those doubts have entered so deeply into the study of the past itself that historians can hardly afford not to attend to them directly.

The condition in which history has found itself since Ranke may therefore be described as a combination of escalation and polarization. By escalation I mean the growth in the speed and intensity with which historical knowledge is being produced and destroyed {7 | 8} in successive corrections to the established picture. The cycle is familiar. It started in the nineteenth century with the inclusion of the Middle Ages among the subjects worthy of sympathetic study (as opposed to the critical obloquy the Middle Ages had suffered from humanists, reformers, and enlightened *philosophes*), continued with the turn to social and economic history (admirably modeled by the *Annalistes*), then extended the reach of history to the whole world, and has most recently resulted in histories doing better justice to women and sexual minorities. Each new departure followed the same basic pattern; each was intended to achieve a more adequate representation of the past; none satisfied the underlying need; and all were therefore superseded in their turn.

In this regard the turn to medieval history is paradigmatic. Given history's origin in the great early modern war on medieval forms of order, the turn to the Middle Ages was not only the first and, in a sense, the greatest correction to our knowledge of the past historians could possibly have made, but also the most spectacular to fail in its purpose. The boundary dividing medieval from modern history and the strange ghetto to which it continues to confine medievalists—deprived of full recognition in some ways, specially privileged in others—are an abiding scandal in a profession seeking to comprehend the past without discrimination, and a haunting reminder that medieval history may be impossible to fold into plain history without abolishing the conditions to which historians owe their existence.

By polarization I mean the divorce of theory from practice and the resulting divisions in the profession. In its heyday, history *was* theory: a theory of the past arising directly from the practice of examining the evidence in order to achieve a knowledge adequate, not to the past, but to the purpose of undermining the foundations of an eminently present form of political authority. Practice and theory were harnessed to one and the same goal; no further

theory was needed. As soon as the purpose of history was confined to achieving adequate knowledge of the past, practice and theory began to go their separate ways. Theory passed out of history into social science and the philosophy of language, and practice took on a life of its own. The result is an ongoing series of dysfunctional debates. Those on the Right insist that there is nothing wrong with the practice, but only with our failure to live up to the standards set by the historians who came before. Those on the Left conclude that history is fodder for social science or, since the linguistic turn, nothing but the kaleidoscopic play of signs in self-referential systems that never make contact with reality. Meanwhile those who keep walking on the straight and narrow path towards the truth that history can offer are forced to assert the very thing that they deny. Steven Shapin captures it perfectly in the opening sentence of *The Scientific Revolution*: "There was no such thing as the Scientific Revolution, and this is a book about it."[1] The candor, good cheer, and unflinching sense of professional responsibility embodied in that sentence do honor to its author. But they can scarcely alleviate the predicament of a profession forced to choose between knowledge and meaning.

The trouble history faces today does therefore not consist of the excessive specialization in research so commonly singled out for criticism. It may well be true that we know more and more about less and less. But that truth goes to the meaning of our knowledge, and not to its extent. A good case might even be made that our knowledge, so far from being too specialized, is not specialized enough. It was nothing if not specialized research that allowed Erasmus to insist that *ecclesia* meant 'congregation,' and Valla to prove that the Donation of Constantine was a forgery. Nor does it hit the mark to claim that standards are declining. By any measure I can trust, the standards by which history is measured are just as high today as they have been at any time before, and possibly much higher.

The trouble rather stems from the enduring strength of the conviction that history ought to result in adequate knowledge of the past, the whole past, and nothing but the past. Historians are divided over the question whether or not such knowledge can be attained. But they are certain that it should. That certainty puts them at odds with themselves. On one hand, they insist that the meaning of all documents depends upon the (changing) context in which those texts are written. On the other hand, they insist that the meaning of the books they write depends entirely upon their (timeless) adequacy to the past. They make an exception for themselves. That can have only one effect: to reproduce the battle that once pitted historically minded humanists against

1 Shapin, *Scientific Revolution*, 1.

defenders of political anachronism (as tragedy) within the study of history itself, where it now pits defenders of the text against proponents of theory (as farce). That is not necessarily to be deplored. The escalation and polarization that are displacing history from the preeminent position it used to enjoy may rather deserve to be understood as the best means available to creatures who have no knowledge of the future with which to divest themselves of beliefs that are no longer in accord with the times.

It would be a sad misunderstanding to conclude that history has therefore lost its uses. At its best, history still functions as it should. But the cost of keeping history at its best is rising, and the pursuit of knowledge of the past no longer has the meaning that it used to have. To the extent that the turn to the sources serves only to achieve more knowledge of the past, it has been severed from the cause it was once meant to serve. To the extent it has been severed from that cause, it has lost meaning. The time for the great triumph that history celebrated in the nineteenth century is past. What used to be a sacred ritual is now routine. History has run into a logical dead end from which it is unlikely to extricate itself without a reconsideration of its purpose more fundamental than can be carried out within the limits of the profession.

2 How?

What I have said so far is not particularly difficult to say. Admittedly it is far too {8 | 9} schematic not to require qualifications. But qualifications are easy to supply. The real difficulty (and the reason why I have made a schematic case) is how to get the point across. To put it in appropriately paradoxical terms, the argument demands that we suspend the same belief that it asserts we have. Precisely to the degree that history removes the possibility of doubt from the belief in individual autonomy and the requirement that we must place the evidence into the context of its time and place to understand its meaning, so must we reject the argument that history is a ritual from which those beliefs draw strength. If we are able to believe it, the argument is false; if it is true, it cannot be believed. Wittgenstein made just this point, I think, in writing, "One can mistrust one's own senses, but not one's own belief. If there were a verb meaning 'to believe falsely', it would not have a meaningful first person present indicative."[2]

That ruled out two ways in which I might otherwise have tried to make my point. One was to write a sort of history of historical writing or of historical

2 *PPF* §§ 91–2.

consciousness. This has of course been done, and the results have often been superb. But even the best rely on the same assumptions on which history in general relies. They differ only in their choice of subject from other kinds of history. Instead of focusing on economy, politics, society, or war, they focus on what people thought and wrote about the past, the forms their writing took, the history of those forms, the various schools of historical thought, the literary devices they employed, the degree to which the people and their histories managed to live up to the standards they had established for themselves, and so on. Meanwhile the method continues to consist of placing certain pieces of evidence into the context of their time and place and ruling out certain alternatives that rest on different assumptions. That path was closed to me.

The other path was to examine history with the help of philosophy. That might have been more promising. But two distinct considerations stopped me from going in that direction. One was that I lacked the appropriate intellectual technology. I enjoyed reading philosophy and flattered myself that for an amateur I knew it reasonably well but I did not practice philosophy as my profession and did not believe it would be wise for me to try without the proper training. That was a purely practical consideration. The other consideration turned on a point of principle. It seems to me that history and philosophy are not enemies at all, but rather allies in the same logical cause, maintaining, with different means and from different points of view, the same basic understanding of what the world is really like. I cannot possibly be sure that this is so. But I could find no way towards a form of philosophical analysis that would not either fail to challenge the ritual in question or seem to call for a return to the alternatives that history had displaced (universal empire, divine providence, custom). That would have been unbelievable at best, and completely illegitimate at worst. The path through philosophy therefore seemed blocked to me as well.[3]

The method I chose instead was to impersonate a historian. The best way to reveal the assumptions that lie beneath the study of the past, I thought, was simply to put them into practice, not for the sake of adding to our knowledge, but rather for the sake of pushing them to their limits. At those limits, so I

3 {Now it no longer does, because this is precisely the path that Wittgenstein opened up. He did so, in part, by demonstrating the degree to which philosophy, as it has traditionally been conceived, is dominated by "the *preconception* of crystalline purity" (*PI* § 108). That preconception constitutes the common ground on which philosophy and history have been allies in the same logical cause. "Turning our whole inquiry around . . . on the pivot of our real need" (ibid.) makes it possible to conceive of the relationship between philosophy and history in thoroughly new ways.}

hoped, it would become apparent that the pursuit of knowledge of the past serves to maintain a certain form of order and to eliminate potential rivals from the field.

Impersonating a historian was not particularly difficult for me. I had been trained in history and had been practicing it in the academy for quite some time. As a matter of principle, I could have chosen any subject; as a matter of practice, I chose a subject from the history of early modern political thought: the German physician and historian Hermann Conring (1606–81).

There were two different reasons for that choice. First, I knew enough about early modern political thought to have a professionally informed opinion on what needed to be done about its history in order to arrive at the more adequate understanding of the past that is the official goal of my profession. {What needed to be done was to integrate the history of law into the history of political thought, to bridge the artificial divide between medieval and modern political thought, to cross the equally artificial border relegating the Holy Roman Empire to historical irrelevance, and to extend our knowledge from classic authors like Machiavelli, Hobbes, and Locke to lesser known figures who were important in their day but have long since been forgotten.

Conring was perfect for that purpose: a German who studied medicine in Leiden, a modern scientist who followed Aristotle, a student of history, law, and politics, respected, original, and influential in his day, largely forgotten since then—ideally suited to focus the attention as standard academic monographs will do.[4]}

Second, Conring was instrumental in the turn from anachronistic universalism to historical consciousness. If he is still remembered for anything at all, it is his lucid demonstration that Roman law derived its validity in Germany, not from any supposedly universal rights of the Roman Emperor, but from the fact that German students went to Italy to study law and, when they returned, practiced the law that they had studied there.

From the perspective of the argument I wanted to make, Conring combined two equally important qualities. On the one hand, he was fully invested in the historical enterprise that had got started in the later Middle Ages. He was as firmly convinced as any one of us could be that if you want to understand the meaning of a text, you must first place it into the context of its time and place. That makes him similar to us. On the other hand, he was fully aware of the political significance this knowledge had. He was aware of it because he needed it in order to cut down the universal aspirations of emperors like Ferdinand II, whose effects he witnessed during the Thirty Years War. He did write history (the history of the Roman Empire from antiquity to the present).

4 {Lack of space forced me to cut this passage from the original version.}

But the meaning of that history did not turn on its (severely limited) adequacy to the past. The meaning rather turned on the degree to which that history permitted Conring to deny universality to Roman law and to affirm the liberty of territorial states and individual people acting according to the circumstances of their time and place. That made him different from historians today. A study of Hermann Conring, I believed, would therefore make it relatively easy to show that the meaning of history depends upon the context in which historians themselves are working, and how that meaning can be eroded by the search for adequate knowledge of the past.

I stated the general argument in Chapter One of *The Limits of History*. Chapter Two is a straightforward account of Conring's life and works. It ends with the conclusion that there remains much more to be learned about what Hermann Conring thought.

Chapter Three is devoted to the close analysis of a piece of evidence in the context of its time and place. It focuses on Conring's *New Discourse on the Roman-German Emperor*. Since the *New Discourse* began as a dissertation that Conring supervised and was then published in a pirated edition, it offered much latitude for me to exercise the craft of the historian on many of the technical difficulties involved in attributing a certain piece of evidence to a certain author and coming to firm conclusions about that author's responsibility. When everything was said and done, it turned out to be impossible to describe what Conring really thought in terms resembling the sort of thing to which historians commonly refer as an "idea" or an "intention."

Chapter Four contrasts two pieces of evidence from different times and places in order to determine what had changed. One is the *New Discourse on the Roman-German Emperor*; the other is the account of the Roman Emperor's right to rule the world that Bartolus of Sassoferrato had given in the fourteenth {9 | 10} century. Since Bartolus's writings are difficult and subject to notoriously conflicting interpretations, here too there was much latitude for putting the tools of history to work. The upshot was that Conring's argument missed the point that Bartolus had made, begged the question, and changed the subject under investigation. No historical development could be identified that would explain the change in question. Chapter Five states conclusions.

3 QED

The point is not that historians are biased; the point is that studying history is in and of itself to take a stand in favor of a certain form of order. Taking that stand is to exclude by definition some other stands from the impartial presentation at which history ostensibly aims. To the extent that we identify

with history, we are disqualified from seeing what it excludes, except perhaps indirectly, out of the corner of the eye I tried to open in *The Limits of History*. That may not come as much of a surprise. Surprising, to me at least, is only the self-confidence with which historians seem to believe that it is possible to take a stand on history without excluding anything at all from comprehension.

In order to avoid confusion I would like to emphasize that I share none of the gloom arising from the view that language is a self-referential system, such that its signs do not allow us to gain access to reality itself, but only to linguistically constructed reality. The gloom may be a fair price to pay for those who are convinced that knowledge does not qualify as real unless it is as clear and distinct as Descartes maintained it ought to be. But I do not believe that it is tenable for creatures who rely on language for their knowledge to distinguish between linguistically constructed knowledge and knowledge of "real" reality, even if the distinction is made only to rule out the possibility of knowing "real" reality. I could not agree more that our knowledge is linguistically constructed. But far from making it unreal, that is what makes it knowledge. As far as I can tell, we do know what is real, and we can tell what happened. We just never know it as clearly as we would like. Precisely because it is real, our knowledge is fuzzy, incomplete, and changing. I do not see that anything is wrong with that. Taking no stand at all is certainly not an option.[5]

Thucydides is famous for having said that in writing the history of the Peloponnesian War he wanted to produce a possession for all time. If by 'possession for all time' he meant (which I do not believe he did) a kind of knowledge that can be carried from one context to another without requiring any change at all, he would have been wrong. Our knowledge is itself a part of the reality of which it is our knowledge.[6] The knowledge of the past that we can have is therefore just as fleeting as the past we study—no more, no less. That is no counsel of despair, but merely an acknowledgment that all things change.

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5 {See now Fasolt, "Saving Renaissance and Reformation."}

6 {In the previously published version I consented to the editor's wish to replace "Our knowledge is itself a part of the reality of which it is our knowledge" with "The reality we perceive is partially the product of our knowledge." I do not remember the reasons why I agreed to make this change, but the result conflicts so directly with what I wanted to say that I am glad to be able to reverse it.}

CHAPTER 19

Religious Authority and Ecclesiastical Governance

There is a standard story about religious authority and ecclesiastical governance in early modern Europe. It runs somewhat like this:

> In medieval Europe religious authority lay in the hands of clerics. Clerics were regarded as superior to the laity, and they were governed by the papacy in Rome. When there were disagreements about the faith, the papacy had the last word. Dissenters were condemned as heretics and handed over to lay governments for punishment. Orthodoxy was ruthlessly enforced and there was no religious liberty.
>
> That changed during the Renaissance and Reformation. Lay people began to grow dissatisfied with the enforcement of orthodoxy and claimed a growing share of religious authority for themselves. When Martin Luther proposed a new kind of theology, their dissatisfaction erupted into outright rebellion. After about a century of violent religious wars, the papacy had to admit defeat.
>
> The outcome was settled more or less around the time of the Peace of Westphalia (1648). Priests and bishops continued to exist. But they were divided into different confessions and the papacy lost the ability to impose its will by force. Education, persuasion, and enlightenment took the place of the inquisition and the stake, and religious liberty was enshrined as a natural right. That was a great step forward in the history of humanity's progress from ignorance and oppression.

The problem with this story is that it does not explain what happened to religious authority during Renaissance and Reformation. It assumes that medieval people somehow knew what we call religious liberty, and that the difference between them and us is simply this: they did not have it, and we do. It tells us why they did not have religious liberty (because the clergy wanted to exercise control over their faith) and how we managed to gain it for ourselves (because the monopoly of the papacy over religion was broken up and the church was separated from the state). But it does not explain how religious authority

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changed when it was handed over to the laity. It rather conceals a transformation in the criteria by which we judge what counts as faith and what as knowledge. It thereby reassures us that we can trust {364 | 365} our understanding of concepts like 'religion,' 'authority,' 'church,' and 'state' by projecting them back on to the past.

There are other ways in which the standard story can be criticized: it is incomplete and it embodies an idea of progress no longer as convincing as it was a hundred or two hundred years ago. Historians are busily unearthing a cornucopia of details to fill in the blank spots. They have been doing so almost since the professional study of history came into its own in the nineteenth century, with works like Ranke's *History of the Reformation in Germany* and Burckhardt's *Civilization of the Renaissance in Italy*, two classics of modern historiography not coincidentally devoted to the Renaissance and Reformation. They are still debating whether or not some kind of progress has in fact occurred; if so, to what extent; if not, what it is lacking. They are shaking off the national and confessional hostilities that used to burden them. Social history, cultural history, anthropology, and the study of what has been called 'confessionalization' have established much common ground.[1] Today, our understanding of religious authority and ecclesiastical governance in early modern Europe is therefore detailed, rich, and subtle beyond what Ranke or Burckhardt could have imagined.

But telling the story in more detail and exercising greater care in calling its outcome good or bad is not enough. The problem facing historians today lies neither in the details nor their evaluation. It lies in the lack of an alternative that can be sketched as briefly as the standard story but does not presuppose what ought to be explained. Before we can explain how religious authority changed in the Renaissance and Reformation, we therefore need to take a closer look at how it operated during the Middle Ages.

1 Religious Authority in Medieval Europe

Religious authority in medieval Europe was shaped by three main factors. First, knowledge was based on writing; second, most writing was in Latin; and third, the ability to read and write was limited to clerics. It is misleading to view medieval Europe as a place where knowledge rested on memory and oral tradition. Memory and oral tradition mattered more than today, but not as much as in societies where there is no written literature at all (like those of hunters

1 O'Malley, *Trent and All That*, is good on the historiography.

and gatherers). Not only was there writing in medieval Europe, but writing was scripture—and scripture was not mere letters on the page, but *Scripture*, the Bible, the sacred Word of God. It is equally misleading to believe that clerics were ordained priests or consecrated bishops. Clerics came in all sorts of shapes and sizes. Many of them were simply students, not unlike Chaucer's clerk, and some of them were indistinguishable from the laity. They were literati in the elementary sense of knowing how to read and write in Latin. But they were never more than a small sector of society. Their literacy was a privilege that distinguished them sharply from the great majority of the population. Medieval society was hierarchical in many ways. But the most obvious way was the subordination of the illiterate laity to the literate clergy.

Medieval society was therefore marked by a characteristic tension. On the one hand, writing was viewed as a source of truth. On the other hand, writing was accessible only to a small group of people. Ordinarily this is considered a great deficit. {365 | 366} That is not altogether wrong. There is an obvious sense in which the hierarchical organization of medieval society kept ordinary people in thrall to priests and knights. This is the same sense in which ordinary people were being kept in thrall to priests and knights in all of those large-scale agro-literate societies, as they have been called, that were the predominant form of social organization across the globe from about the fourth millennium BCE until the nineteenth century, when the Industrial Revolution, capitalism, and massive urbanization changed the most basic rules of the games that humankind has played since its emergence from prehistory.[2] But simply to equate hierarchy with oppression is to misunderstand the role that writing plays in authenticating truth, both in modern, literate societies and in societies most of whose members were illiterate. Perhaps more important, it is to ignore the conceptual foundations of oppression in egalitarian societies.

An analogy may help to clarify this point. It is taken from the activity of measuring—not coincidentally an activity crucial to modern science. Assume you use a ruler to measure the length of your foot. How do you know your measurement is true? The answer is, of course, "from observation," namely, the observation made in placing the ruler next to the foot and noting the marks on the ruler that correspond to the length of the foot. Up to a point that answer is enough. But a further question can be asked: "How do you know your ruler is reliable?" Usually that question need not be asked. But it is always possible, and sometimes it must be answered, especially when it concerns disputes about the measurement of something that matters to society at large. The standard way of answering that question is to compare your ruler to the standard

2 Gellner, *Plough, Sword and Book*.

meter bar kept at the International Bureau of Weights and Measures in Sèvres, near Paris.[3]

Now it might seem that this answer, too, depends on observation—the observation made when you put your ruler next to the standard meter bar. But in this case observation is not enough, for if it were, you might go on to ask a further question: "How do you know the standard meter bar itself is reliable?" That question, however, is nonsensical.[4] The standard meter bar is reliable by definition. The reason has nothing to do with lengths or observations. The reason is that an agreement has been reached to use this object as a means of last resort with which to settle disputes about the accuracy of measurements of lengths. That agreement makes it the standard meter bar: the actual length is not the point; the agreement is. So long as the agreement holds, no matter how long the bar may be, its length is that of one meter.

The measurement of lengths—or, more precisely, the authentication of the truth of measurements of length by means of the standard meter bar—furnishes an instructive instance of a kind of truth that rests neither on reason nor on observation, but on a consensus without which neither reason nor observation could begin to do their work. In medieval Europe a similar consensus governed the use of writing. Writing was something other than a mere means of communication or a depository of knowledge. It functioned like a ruler by which one's views were measured. The clergy held the ruler and used it to measure the views of the laity. Sometimes there were disputes about the reliability of the ruler. In order to resolve such disputes, there had to be agreement on a standard with which the reliability of the ruler could be judged. That standard was the Catholic faith as declared by general councils and the papacy. {366 | 367}

In the age before printing was invented, writings were copied by hand. They differed from case to case; even the Bible existed in different versions. But there was only One Holy Catholic Church and only one pope in Rome. The pope derived his authority directly from an unbroken chain of apostolic succession that went straight back to St. Peter. He looked like any other bishop. But his

3 I simplify greatly, but the principle is the same, regardless of whether the standard used to authenticate the reliability of instruments of measurement consists of a metal bar, the wavelength of a specified color of light, or any other thing. For details, see http://www.bipm.org/en/si/history-si/evolution_metre.html (accessed 8 July 2005).

4 For a deservedly famous demonstration of the reasons why it is nonsensical, see *PI* § 50, and the commentary on "Ostensive Definition and its Ramifications" and "The Standard Metre" by G. P. Baker and P. M. S. Hacker, *Wittgenstein: Meaning and Understanding*, 81–118, 171–83.

authority was unique in the same sense in which the authority of the standard meter bar is unique. It rested on a consensus to use his word as a means of last resort with which to judge the reliability of all other words. His word was true by definition, just as the standard meter bar by definition is one meter long. The question whether or not his word was actually true was nonsense, quite like the nonsense of asking whether the standard meter bar is actually one meter long. He was that spiritual man of whom St. Paul had written, "he that is spiritual judgeth all things, yet he himself is judged of no man" (1 Cor. 2:15). Canon law concluded: "the first see shall not be judged by anyone."[5] And one of the most distinguished experts on canon law declared:

> So long as he does not go against the faith the pope can do and say whatever he pleases. He can even deprive someone of his rights, for there is no one who may ask him: "Why are you doing this?" . . . His will stands in the place of reason, and whatever pleases him has the force of law.[6]

Viewed in this way, the hierarchical organization of the medieval world makes better sense than can be grasped so long as the use of writing is thought to consist entirely of communication, and knowledge to stem entirely from reason and observation. The certification of the truth by means of writing and the authentication of the truth by the papacy met the same basic need as the measurement of lengths by means of rulers and the authentication of the standard meter bar by the International Bureau of Weights and Measures: it assured the integrity of a system of reference and meaning. The papacy's authority did not rest on the truth of its pronouncements, but on a consensus that its pronouncements settled disputes about the standards with which the truth was ascertained. Just as the surreptitious substitution of some other meter bar for the true standard meter bar must be prevented in order to maintain the integrity of the system of measuring lengths, the substitution of false popes needed to be prevented in order to maintain the integrity of the system of ascertaining the truth. Without the papacy's ability to guarantee the unity of the faith, writing could not be trusted to fulfill its function as a ruler with which all truths were measured. Communication would have broken down in irresolvable disputes and society would have fallen apart.

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5 "Prima sedes non iudicabitur a quoquam." D. 21 c. 7, in *Corpus iuris canonici*, ed. Friedberg, 1:71.

6 William Durant the Elder, *Speculum iudiciale*, 1.1, De legato 6.52, quoted from Fasolt, *Council and Hierarchy*, 67. Note the explicit exception for a heretical pope.

The idea of religious liberty could therefore not have made much sense to medieval people. Demanding a right for every person to hold whatever religious beliefs seem right to them would have threatened their ability to distinguish true from false. They had to consider the demand for religious liberty meaningless or dangerous in the same sense in which we would find it meaningless or dangerous if someone were to protest against the tyranny of the standard meter bar and claim that every person has an inalienable right to determine how long the meter ought to be. We recognize that our measuring devices need to conform to standards in order to fulfill their purpose; we sanction the punishment of people who intentionally use false measuring devices; and we do not regard the choice of the standard meter bar as a natural right. In the same way the people of medieval Europe believed that statements {367 | 368} about the truth had to conform to writing, and that the truth of writing was guaranteed by its conformity to the official declarations of the church. The authority of the church was universal in the same sense in which the authority of the standard meter bar is universal: it rested on a consensus of society as a whole without which society could not have existed.

That does not mean that each and every person was forced to hold the same religious views. Quite the contrary—the variety of different ideas about religion that flourished throughout the Middle Ages and the freedom with which those ideas could be explored were almost certainly greater than in the modern age. Conformity is not the same as identity. A wooden stick about a meter long and a precision tool calibrated to measure a thousandth of a millimeter can both serve the purposes of measuring, so long as they conform to the same standard meter. A shepherd in the Pyrenees, a local parish priest, and a Dominican professor of theology could all proclaim ideas about the truth. By no means were their views identical nor did they need to be. But the freedom with which they were allowed to state their different views depended on their consent to the principle that all claims on the truth were ultimately subject to the judgment of the papacy. Heresy did not consist of holding erroneous views or disagreeing with the pope, any more than using badly calibrated rulers threatens the system of measurement. Heresy consisted of the heretic's refusal to bow to the authority of the church.[7]

7 "A heretic, by canonical definition, was one whose views were 'chosen by human perception, contrary to holy scripture, publicly avowed and obstinately defended'." Moore, *Formation of a Persecuting Society*, 68, with reference to C. 24 q. 3 cc. 27–31, in *Corpus iuris canonici*, ed. E. Friedberg, 1:997–8.

2 How Religious Authority Changed

The question is, of course, why did that change? What turned religious hierarchy and conformity to the papacy from an apparently useful means of guaranteeing truth into a form of religious oppression? The answer turns on the spread of literacy. Schools and universities were founded in growing numbers throughout the later Middle Ages. The use of paper made from rags reduced the cost of books below what it had been so long as writing surfaces were being made from skins of animals. The invention of printing with moveable type in the fifteenth century furnished the people of Europe with an efficient and unprecedented means of multiplying copies of the same text. More schools, cheap paper, and printed books meant that the laity learned how to read and write. Soon it learned to read and write for its own purposes, not only in Latin, but also in the various European vernaculars. Illiterate merchants became obsolete and an increasing share of secular business was carried out in writing. As a result the difference between the clergy and the laity lost its hierarchical significance. What had been a crucial marker in the organization of a hierarchical society became a distinction without a difference and a source of unjustifiable inequity.

In their general outline these changes are well known. But in order to appreciate their significance it is not enough to know that writing spread. The point is that the spread of writing led to a change in the criterion of truth. While writing was the prerogative of a small sector of society, the criterion of truth consisted of conformity to the church as represented by councils and the pope. The chief problem for the maintenance of religious authority was not how to make sure that everyone shared the same beliefs—impractical to the point of impossibility in a society as highly {368 | 369} differentiated and lacking in modern means of communication as medieval Europe was—but rather how to make sure that everyone acknowledged the authority of the papacy to act as a judge for all. Different degrees of conformity to the papally sanctioned truth were thought to be not only tolerable but a legitimate expression of the hierarchical dispensation of the truth. Medieval orthodoxy required submission to the pope as the ultimate arbiter of truth, but not much else besides. What the believer actually thought was somewhat beside the point, just as it is somewhat beside the point how accurate your ruler really is, so long as you do not dispute the standard meter bar.

That changed when writing became a common possession of society and printing put the same texts into the hands of every reader.[8] The difference between the clergy and the laity was watered down and the criterion of truth

8 Grafton, Johns, and Eisenstein, "AHR Forum."

shifted from conformity to the church towards the sense expressed in writing. Now orthodoxy meant having the same understanding of the faith as every other member of the church, not merely following the lead of the papacy. Truth could no longer be conceived in terms of conformity, and mere submission to authority—no matter how sincere—lost its ability to certify orthodoxy. The papacy was forced to vacate the office of religious standards, and identity of sense ascended to its throne.

Three periods in the history of religious authority in early modern Europe can therefore be distinguished. The differences between these periods do not turn on the spread of literacy as such, but on the effects the spread of literacy had on the consensus of society. In the first period the shift away from conformity to the lettered by the illiterate towards mastery of writing's sense by all got underway and gathered speed. But it did not yet pose an explicit threat to the clergy's exclusive right to judge religious truth in the established way. This period is commonly known as the Renaissance. During the second period, the traditional reliance on conformity to the church came under direct assault from people claiming that religion required all believers to grasp the sense of Scripture for themselves. This period is commonly known as the Reformation. The third period was marked by a proliferation of conflicting views on what the sense of Scripture was, along with a prolonged attempt to solve those conflicts by force. This period is commonly known as the Age of Religious War. It ended when agreement was reached on a new method of exercising religious authority. Roughly speaking, that happened at the Peace of Westphalia in 1648. Let me describe these periods in more detail.

3 The Renaissance

The Renaissance is often seen as a movement of cultural innovation that was centered in Italy and took its inspiration from classical antiquity. The very term "Renaissance" ("rebirth") stresses the degree to which contemporaries understood themselves to be witnessing the return of something that had existed once before. That view has much to recommend it. In painting, architecture, thought, and letters the models of classical antiquity gained a new prominence. At the same time, the models elaborated in the high Middle Ages—Gothic architecture and scholastic theology, for example—came in for critical attention. {369 | 370}

The most important point, however, is the degree to which the turn to classical antiquity advanced a shift in the criterion of truth. The Renaissance began in Italy because in the Italian city-states the use of writing had for a long time spread much further beyond the limits of the clergy than elsewhere in Europe,

and the border dividing the clergy from the laity had long been more porous than further north. The more thoroughly the clergy in Italy came to be integrated into lay society and the more successfully the laity managed the literate methods of the clergy, the less they were able to rely on conformity to clerically sanctioned interpretations of Scripture as a foundation for religious authority.

Classical antiquity offered a ready-made alternative. The distinction between clergy and laity that loomed so large in medieval Europe did not exist in ancient city-states as such. Of course there had been priests and temples. But ancient politics was carried out on the principle that all citizens were equal members of the polity. Regardless of whether they ruled themselves in free republics or were subject to an emperor, citizens were not divided into clergy and laity. In liberty as well as under tyranny citizens enjoyed equality. Classical antiquity had also produced a significant body of literature of which so much survived that it could fruitfully be mined for guidance in the quest for a consensus on the truth when truth could no longer be equated with conformity to the clergy. It helped that the clergy based much of its own authority on ancient writings. Classical antiquity thus seemed to offer a solution to the problem posed by the erosion of the line dividing the clergy from the laity.

The fourteenth-century humanist Petrarch was one of the first and greatest minds to advance that line of thought. When Petrarch drew a new theory of virtue from reading the works of Cicero, something quite different from mere reverence for ancient models was at stake. The point was that the virtue on which Cicero had written was one and the same for every human being. That does not mean that Cicero had not distinguished between different kinds of virtue. There were four virtues—wisdom, courage, temperance, and justice—on the list of cardinal virtues alone. It rather meant that wisdom, courage, temperance, and justice did not vary according to one's standing in society, especially not according to one's membership in the clergy or the laity. From Cicero's perspective it made no sense to say that wisdom was peculiar to the clergy, and courage to the knights, much less that justice ought to be meted out in different ways (by Roman law, canon law, or local custom) and in different courts (temporal or spiritual) depending on whether one belonged to the clergy or the laity. Petrarch agreed. Each and every member of the polity ought to be wise, courageous, moderate, and just. If some were not as virtuous as others, that could no longer be interpreted as a legitimate manifestation of the hierarchical gradations of a society composed of different ranks and orders where the virtues of clerics and monks ranged at the top and those of peasants at the bottom. It rather amounted to a failure to live up to standards that were the same for all. Thus Petrarch replaced a hierarchy of virtues that corresponded to the ranks and orders of a hierarchical society with an identical morality for all.

Something similar may be said about the humanist movement that swept Europe in the fourteenth and fifteenth centuries. Humanists valued language above all else. They taught the laity how to express themselves clearly, elegantly, and persuasively—in speaking as well as in writing, in Latin as well as in the vernacular—and {370 | 371} they did so by drawing on the models of classical antiquity. Following the definition of Paul Oskar Kristeller, Humanism may therefore be defined as an educational movement giving pride of place to the study of classical grammar, rhetoric, poetry, history, and moral philosophy.[9] Much ink has been spilled over Kristeller's definition of Humanism. According to Hans Baron, Humanism had a definite content, quite apart from the classical forms in which that content was expressed: it taught republican virtue.[10]

From the perspective taken here, the difference between Kristeller and Baron looks like a false dilemma. Humanism's turn to classical forms of expression amounted in and of itself to a substantial change. Each of the five disciplines whose study it encouraged put the laity in a position of equality with the clergy by eroding the hierarchical distinction between the lettered and the illiterate, regardless of whether the outcome was a republic of virtue or a princely tyranny. Grammar allowed the citizen to read and write correctly; rhetoric allowed him to convince his fellows of whatever truth he had grasped; in poetry he spoke about the self in search of meaning; in history he wrote about the relationship between himself and the community; and in moral philosophy he studied how to settle on a proper course of action without conforming to any superior authority or taking his guidance from the clergy. Humanism advanced a shift in religious authority (to that extent Baron was right), not by endorsing any particular ideas of right or wrong (to that extent Kristeller was right), but by changing the criteria by which all such ideas were judged.

A few lines from Petrarch's letters will show how closely the use of language, the practice of virtue, and the assumption of religious authority lay side by side during the Renaissance:

> I urge and admonish that we correct not only our life and conduct, which is the primary concern of virtue, but our language usage as well. This we will do by the cultivation of eloquence. . . . How much help eloquence can be to the progress of human life can be learned both in the works of many writers and from the example of daily experiences. How many people have we known in our time who were not affected at all by past examples of proper speech, but then, as if awakened, suddenly

9 Kristeller, "Humanist Movement."

10 Baron, *Crisis*.

> turned from a most wicked way of life to the greatest modesty through the spoken word of others! . . . Make for yourself a refuge within your mind where you may hide, rejoice, rest without interruption, and live together with Christ, who through the sacred priesthood made you in your youth His confidant and table companion. You will ask, "and with what skills do I do that?" It is virtue alone that is powerful enough to accomplish it all; through her you will be able to rejoice and to live happily wherever you are.[11]

By turning to classical antiquity, Italians thus took a large step forward towards a new understanding of religious authority. But in their view the turn to classical antiquity and the movement to educate the laity did not conflict with the authority of the church. They rather helped to improve the church and to extend it by spreading the use of letters from the clergy to the laity. A good many of their numbers were clerics themselves, studied canon law, and worked for the papacy, including not {371 | 372} only Petrarch but also Leon Battista Alberti, often taken as the embodiment of Renaissance man himself. One of the greatest of them all, Aeneas Silvio Piccolomini, even ascended to the papacy as Pope Pius II.

From the perspective of the history of religious authority, the Renaissance needs therefore to be viewed as part and parcel of the great movements to reform the church that reverberated throughout late medieval history. Historians who assume that church history must be distinguished from the history of the state find it difficult to agree with that point. But that is an anachronistic imposition of modern ideas on late medieval times. The Italian Renaissance and late medieval church reform did not merely happen at the same time. They rather went hand in hand and they belong in the same chapter. Both were replete with criticisms of corruption in church government, both sought to improve the church by improving letters, and neither meant to overthrow established forms of ecclesiastical governance. When the conciliar movement tried to subject the papacy to the control of general councils it did not do so in order to abandon the distinction between the clergy and the laity, but, quite the contrary, in order to renew the laity's allegiance to the clergy. It is no mere coincidence that the clerics assembled at the Council of Constance burned Jan Hus as a heretic at the stake. It rather shows how closely the conciliar movement was tied to the cause of maintaining the authority of the church. The Renaissance peaked at the same time as the great councils were meeting

11 Petrarch, *Letters on Familiar Matters*, quoted from *University of Chicago Readings in Western Civilization*, ed. Boyer and Kirshner, 5:32, 33, 45.

in Constance (1414–18), Basel (1431–49), and Florence-Ferrara (1438–45) in order to reform the church. The same councils played a crucial role in advancing the cause of Humanism by spreading books and manuscripts of ancient learning to the participants. From Petrarch to Erasmus, Renaissance, church reform, and Humanism were closely intertwined.

4 The Reformation

That changed during the Reformation. The Reformation shifted the center of gravity in the historical development of early modern Europe from Italy to Germany and turned what had been a reasonably happy alliance between Renaissance and church reform into a frontal assault on the established structure of the church. In Germany the laity was less familiar with writing than elsewhere in Europe and not as closely integrated with the clergy as in Italy. This was in part because the local vernacular differed from Latin more sharply than was the case in Romance-speaking Italy, France, and Spain, or even in England where the Norman Conquest had turned French at least temporarily into the language of government. It was also because the German clergy, thanks to its disproportionately noble origins and dioceses that were the size of middling states, was far more highly raised above the laity. In Italy the laity's comparatively thorough command of writing and its close integration with the clergy had allowed the shift from hierarchical conformity to individual mastery of sense to proceed in small increments, without major disruptions. In Germany, the same shift was compressed into a smaller span of time and faced with greater obstacles. That gave it the force of an explosion.

The explosion took symbolic shape in the person and theology of Martin Luther. His story—from the indulgence controversy in 1517 and the great tracts of 1520 {372 | 373} (*Address to the Christian Nobility of the German Nation*, *On the Babylonian Captivity of the Church*, and *On Christian Liberty*) to his confrontation with Emperor Charles V in Worms, translation of the Bible while in hiding on the Wartburg, marriage to the former nun Katharina von Bora, and opposition to the rebelling peasants—is so familiar that it need hardly be repeated here. But two points particularly telling for the nature of religious authority deserve to be spelled out.

One is the clarity with which Luther treated the sense of Scripture as the sole foundation of religious authority. He rejected religious authority of any other kind with uncompromising candor. He detested the confusion of religious authority with conformity to the church. He had nothing but contempt for the imitation of Christ as it had flourished in the later Middle Ages, and

he heaped scorn on a distinction that had been close to the heart of medieval religiosity; namely, between commands and counsels of perfection.[12]

Conformity to the church and resemblance to Christ could be imagined in different degrees. A common medieval teaching had therefore been that not all Christians needed to follow Christ's commands to the letter. When Christ said to the rich man, "if thou wilt be perfect, go and sell that thou hast, and give to the poor," (Matt. 19:21) that was not really a command; it was merely a counsel of perfection. Monks followed it by giving up their private property when they entered the monastery. Mendicant friars like St. Francis vowed even stricter poverty than monks. Monks and friars therefore resembled Christ more closely than did the laity, who kept their property for themselves; they approached perfection. But it was precisely because they approached perfection that their way of life was not obligatory for all Christians.

From Luther's point of view that was a travesty of Christian teaching. Christians were not obliged to make themselves resemble Christ at all. Christ was God, and no human could be like God. Imitation was useless at best and blasphemous at worst. If Christ had wanted Christians to imitate his conduct, Luther thought, all Christians ought to have practiced the art of preaching, assembled a cast of twelve Apostles, and died on the cross, for that was what Christ had done—and none of them should have been cobblers, tailors, husbands, ploughmen, princes, hangmen, or beadles, for Christ was an unmarried carpenter.[13] True Christians did not imitate Christ. Instead they understood his promises and followed his commands without exception or condition. That did not mean that Christians were perfect. It rather meant the opposite: that no one achieved perfection in this life.

The freedom with which this view of the Gospel allowed Luther to put himself on the same footing as the papacy and challenge the authority of the church remains breathtaking. "I have no quarrel with any man concerning his morality, but only concerning the Word of truth," he wrote to Pope Leo X, not as a monk at the bottom of the hierarchy ought to have written to its ruler but as one reader to another, simply concerned to grasp the sense of Scripture. "In all things else I will yield to any man whatsoever: to give up or deny the Word I have neither the power nor the will."[14] The obligation of a Christian was not to follow the papacy but to grasp the sense of the Gospel Christ had preached and to believe his promises. Salvation depended on the Word. Here the shift from conformity to the church towards identity of sense was made complete,

12 Luther, "On Secular Authority," 4, 8.

13 Luther, "On Secular Authority," 18–19.

14 Luther, "Letter to Pope Leo X," 327.

and authentication of the truth by the papacy was replaced with {373 | 374} authentication of the truth by Scripture. Scripture, in Calvin's deservedly famous phrase, was "self-authenticated."[15]

The second point worth stressing is the clarity with which Luther recognized that the sense of Scripture could not be used as a criterion of truth unless hierarchy was replaced with dichotomy. In hierarchy there can be many different ranks and orders that are related to each other by the degree to which they resemble the example set at the top. That degree can infinitely vary. The obligation to master a certain sense, however, admits only two possibilities: either you have mastered it or you have not. There is no in-between, no middle ground, and there is certainly no possibility for anything like a hierarchy of truths ascending to heaven step by step, much less a hierarchy of social orders resembling the hierarchy of truth.

Dichotomies therefore proliferate in Luther's thought. Take for example the distinction that he drew in *Christian Liberty* between the inner and the outer man.[16] The inner man enjoys freedom from the law because he lives by faith; the outer man must serve the neighbor and obey the government. Thus every Christian is at one and the same time a sovereign lord and abject slave. But it is neither possible nor safe to confuse the dichotomy between inner and outer (lord and slave) with the higher and lower elements of hierarchy. The question is, of course, how the life of the inner man is to be reconciled with that of the outer man. But the answer to that question is a mystery that will not be revealed until the final resurrection. In this life, all Christians are both inner and outer, saint and sinner, *simul iustus et peccator*.

Or take the parallel dichotomy between the kingdom of God and the kingdom of the world.[17] No Christian may resist evil; that is one of Christ's commands and all Christians must follow it without exception. But they must follow it only where their own interest is at stake, and their own interest lies solely in the kingdom of God. Meanwhile they live with their neighbors in the kingdom of the world. Where their neighbors are concerned, they may resist evil. Indeed, they are commanded to resist it for the love of neighbor—of course not on their own initiative (which no one could safely take without risking to confuse the love of neighbor with the love of self), but only at the command of their God-given rulers.

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15 "Let this point therefore stand: that those whom the Holy Spirit has inwardly taught truly rest upon Scripture, and that Scripture indeed is self-authenticated." Calvin, *Institutes* 1.7, sec. 5, trans. Battles, 1:80.

16 Luther, *Christian Liberty*, trans. Lambert, 7–8, 21–2, and passim.

17 Luther, "On Secular Authority," 8–14 and passim.

> For you attend to yourself and what is yours in one way, and to your neighbour and what is his in another. As to you and yours, you keep to the Gospel and suffer injustice as a true Christian. But where the next man and what is his are concerned, you act in accordance with the [command to] love and you tolerate no injustice against him.[18]

That is the reason why God ordained the sword and gave it to rulers over the kingdom of the world. So long as those rulers and their soldiers kill for the sake of peace, and not for their own advantage, their killing does not conflict with the command not to resist evil at all. On the contrary, their killing is a work of love.

Dichotomies between self and other, inner and outer, the Christian and the Christian's neighbor, the kingdom of God and the kingdom of the world thus allowed Luther to replace hierarchy (built on conformity to a shared standard) with equality (built on identity of sense). In terms of hierarchy Christians had been asked to explain how closely their conduct resembled the conduct of Christ. The answer resulted in hierarchical distinctions between different forms of conduct with different degrees of merit, depending on how closely they approached perfection. In Luther's terms Christians were asked in whose name their conduct—any kind of conduct—was {374 | 375} carried out: their own name or the name of Christ? There were no degrees of merit; there were only two possibilities. No Christian was to resist evil in his own name; all Christians were to resist it for the love of God and neighbor. As Calvin put it:

> There is a twofold government in man: one aspect is spiritual, whereby the conscience is instructed in piety and in reverencing God; the second is political, whereby man is educated for the duties of humanity and citizenship that must be maintained among men. These are usually called the 'spiritual' and the 'temporal' jurisdiction (not improper terms) by which is meant that the former sort of government pertains to the life of the soul, while the latter has to do with the concerns of the present life. . . . There are in man, so to speak, two worlds, over which different kings and different laws have authority. Through this distinction it comes about that we are not to misapply to the political order the gospel teaching on spiritual freedom, as if Christians were less subject, as concerns outward government, to human laws, because their consciences have been set free in God's sight; as if they were released from all bodily servitude because they are free according to the spirit.[19]

18 Ibid., 15, (brackets in the original).

19 Calvin, *Institutes* 3.19, sec. 15, trans. Battles, 1:847.

Soldiers, priests, cobblers, married, and unmarried folk could all be equally good Christians, no matter what they did in the present life. The question was not what they did, but the sake for which they were doing it. Depending on that sake, they were full members of the society of right-minded people, or banished from it entirely.

5 The Age of Religious Wars

In a few startling phrases, Luther once advocated religious liberty as clearly as could be desired: "No ruler ought to prevent anyone from teaching or believing what he pleases, whether it is the Gospel or lies. It is enough if he prevents the teaching of sedition and rebellion."[20] But Luther could say so only because he did not reckon with the possibility that reasonable people might come to different conclusions about the sense of Scripture. Nothing would have been more repugnant to him than to abandon Scripture as the ground on which all Christians were to take their stand in public no less than private. He was convinced that Scripture had a single sense, and that its sense was clear to all believers. He never wavered from that conviction, even though it caused an irreparable breach with Zwingli and divided him bitterly from the peasants who thought he would support them in their rebellion against their rulers. He stood his ground on Scripture with the same uncompromising certainty that he was in the right as members of the medieval church had stood their ground on the rock of St. Peter; and so did his opponents.

The third period in the history of religious authority in early modern Europe was therefore marked by persistent religious wars. Different interpretations of Scripture's sense were propounded in increasing numbers and no single interpretation won general agreement. Lutherans, Zwinglians, Calvinists, Hutterites, Mennonites, Socinians, and others spread the Gospel in mutually exclusive ways while Catholics were sharpening their own interpretation of the sense of Scripture at the Council of {375 | 376} Trent and devising new means, such as the Jesuits, the Roman Inquisition, the so-called second scholasticism, and missions abroad, in order to keep Catholicism pure, spread its reach, and recover regions lost to Protestants in the great struggle known as the Counter-Reformation. None could agree with any of the others, yet all, including Catholics, insisted with increasing fervor on orthodoxy.

From the Schmalkaldic War in the late 1540s—or even the Peasants' War of 1524–25—via the French wars of religion in the second half of the sixteenth

20 Luther, "Admonition to Peace," 340.

century, and Philip II's great Armada of 1588 down to the English Civil War 1642–48 and the Thirty Years War 1618–48, the inhabitants of Europe found themselves locked in bloody struggles to make one kind of sense prevail over the others. They only stopped when it was clear to all that none were able to prevail. Exhaustion convinced them to admit that Scripture could no longer serve as a criterion of truth and peace did not return until they had agreed on sovereignty as the new criterion.

Accordingly the nature and exercise of religious authority were reconfigured in ways that proved enormously successful until the havoc wrought by sovereign states in the twentieth century led to growing doubts about their legitimacy. A line was drawn that had never been drawn like this before: the line between the private and the public realm. In itself that line was not a new invention. It figures prominently in antiquity and Roman law. It figures even more prominently in the distinction the medieval church had drawn between the sacramental power priests exercised by virtue of their ordination (*potestas ordinis*) over the conscience of Christians in the privacy of the confessional (*forum internum*) and the power of jurisdiction (*potestas iurisdictionis*) the papacy exercised by virtue of its plenitude of power (*plenitudo potestatis*) over the whole church in the public domain (*forum externum*). What was new was the use of that distinction to confine religious authority completely to the private sphere. Henceforth religious authority was going to be grounded in the self, subject solely to individual choice, and wholly removed from the enforcement of laws in the public realm.

That does not mean that religion disappeared from the public sphere, that governments no longer took an interest in questions of faith, or that religious liberty was instantly granted to all. By social habit, if nothing else, but usually as a matter of public policy as well, adherence to one or another religious faith continued to have momentous consequences, both advantageous and disabling, for different sectors of the citizenry. All states had more or less explicit affiliations with one or another kind of church; the Peace of Westphalia gave territorial rulers a formal right to choose the faith to be observed within the borders of their lands (the so-called *ius reformandi*); dissenters suffered serious disabilities; atheism was universally condemned; and Jews were never admitted to full and equal membership in the community.

And yet the middle of the seventeenth century marked a watershed in the history of religious authority.[21] For the first time, religious faith was ruled out as a criterion with which to distinguish members of the community from outsiders. It no longer made a difference to the organization of society whether

21 For a good explanation of this periodization see Rabb, *Struggle for Stability*.

religious faith was authenticated by the papacy or by mastery of the sense of Scripture. A new consensus relegated both kinds of authentication to the private sphere and severed them from laws and law enforcement. Hierarchy gave way to two kinds of sovereignty: the sovereignty of states and rulers in public and the sovereignty of individuals in private. {376 | 377} Social order came to be founded on dichotomies like self and other, domestic and foreign, peace and war, private and public, religious and secular, moral and legal. These are the means by which Europe emerged from a great civil war over the nature and exercise of religious authority and laid the conceptual foundations on which the modern world was built.

6 Conclusion: A Single Story Can Be Told

A single story can therefore perhaps be told about the history of religious authority in early modern Europe without casting that story as progress from ignorance and oppression to reason and liberty. That story could plausibly begin with the Fourth Lateran Council in 1215 and end with the Peace of Westphalia in 1648.

The Fourth Lateran Council met in 1215 under the presidency of Pope Innocent III. It is properly remembered as the greatest council of the high medieval church, and the canons that it laid down may be regarded as the single most important body of legislative work completed in high medieval Europe.[22] The canons began with a formal declaration of the doctrine of the Trinity, and they included the dogma of transubstantiation. They condemned alternative positions as heretical and laid down inquisitorial procedures by which the spread of heresies was to be brought under control. Bishops were obliged to investigate their flock, even where no formal charges of heresy had been brought. Secular governments were sworn on pain of losing their authority to assist the church in seeking out and punishing heretics. All adult Christians were ordered on pain of excommunication to confess their sins and take communion at least once per year. A crusade against the infidels was planned. Temporal rulers who had crossed the papacy, such as the counts of Toulouse, the barons of England, and the enemies of Emperor Frederick II of Hohenstaufen, were subjected to ecclesiastical discipline. At the Fourth Lateran Council the Catholic faith as declared by the papacy served Europe as a universal standard by which all forms of conduct could be judged, to which all Christians could be expected to conform, and to which recalcitrants could be made to conform by force.

22 Foreville, *Latran I–IV.*

About four centuries later, from 1643–48, the Congress of Westphalia assembled close to a hundred and fifty diplomatic representatives coming from Germany, Sweden, France, Spain, and many other states to meet in separate gatherings in Münster and Osnabrück. Three different interpretations of the sense of Scripture—Catholic, Lutheran, and Calvinist—were given equal standing. The freedom of every person's conscience (*conscientia libera*) was explicitly endorsed. People whose faith differed from that of their territorial ruler were assured that they would be "tolerated" (*patienter tolerentur*) and given a formal right to emigrate without damage to life, property, or reputation. Conflicting religious parties were prohibited from using force to make their views prevail and the church was denied the right to exercise any jurisdiction over the clauses of the peace.[23] The papacy protested and annulled what it regarded as a peace with heretics. But its annulment went unheeded and for a century or more it was condemned to political insignificance.[24] Henceforth {377 | 378} individual persons were aiming to become sovereign rulers over their own bodies and minds, as John Stuart Mill was going to put it later on,[25] and questions of public order, including questions of religion whenever religion threatened the peace, were going to be decided by sovereign rulers enforcing the law at home and defending the territory of their state by military force.

The history that unfolded between the Fourth Lateran Council and the Congress of Westphalia consisted of the Renaissance, the Reformation, and the Age of Religious War. The meaning of those phases for the nature of religious authority can be summed up as follows. The Renaissance developed new criteria of religious authority by moving from conformity to the Catholic faith, as authenticated by the papacy, to grasping the sense of Scripture, but it did not assault the established order of the church. During the Reformation, the sense of Scripture escaped from the control of the church and was deployed in opposition to its established structures. Scripture still served to underwrite public authority, but the distinction between clergy and laity lost its hierarchical significance. The Age of Religious War offered conclusive proof that the shift from conformity to sense made peace impossible to keep unless the exercise of public authority was founded on something other than religion, regardless of whether religion was authenticated by the papacy in Rome or by the self-authentication of Scripture. Religious authority was therefore limited to the private sphere, and the maintenance of public order was turned over to

23 *Instrumentum pacis Osnabrugense*, article V, §§ 1–2, 34–7, 48; article VII, § 1, in Zeumer, ed., *Quellensammlung*, 403, 410, 412, 415–16.

24 Repgen, "Der päpstliche Protest."

25 "Over himself, over his own body and mind, the individual is sovereign." Mill, *On Liberty*, ed. Himmelfarb, 69.

sovereign rulers. Thus religious liberty became an inalienable individual right on the condition that private individuals would keep their religion to themselves, surrender the use of force to sovereign states, and use no other grounds on which to make demands upon the public sphere than reason and observation.

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CHAPTER 20

Hegel's Ghost: Europe, the Reformation, and the Middle Ages

According to an old historical tradition the Reformation marked a fundamental break from the Middle Ages. The tradition has a point, because the Reformation really did bring major change. But it is also misleading, because it confuses the reformers' point of view with the history from which that point of view emerged. Seen from a broad perspective, the Reformation continues European-wide developments beginning around the turn of the millennium, including the creation of a governmental church under the leadership of popes like Gregory VII, Alexander III, and Innocent III. Of course that is not how the protagonists of the Reformation saw things. They defined themselves in terms of theological distinctions opposing Protestants both to each other and to Catholics, and they sharpened national distinctions between Germans, Italians, Frenchmen, Spaniards, and so on. In their own eyes they surely did break with the Middle Ages, and their self-understanding was a crucial ingredient in their success. But it ought not to be confused with history. The differences between Protestants and Catholics—like those between the European nations and the conventional distinction between medieval and modern history—obstruct an understanding of European history as a whole. The purpose of this essay is to lay the possibility of such an understanding before both medievalists and early modernists.

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This essay started as a paper given in 1999 in German at the Historisches Kolleg in Munich under the title "Europäische Geschichte, zweiter Akt: Die Reformation" and published in Brady, ed., *Deutsche Reformation*, 231–50. Since then it has gone through many changes and benefited from the advice of many friends and scholars, particularly Thomas A. Brady, Jr., the late Heiko Oberman, Heide Wunder, Heinz Schilling, Peter Blickle, Friedrich Schubert, Horst Wenzel, Paolo Prodi, R. I. Moore, Ian Morris, William H. McNeill, John Najemy, the members of the European History Colloquium at Cornell University, and my anonymous readers. I thank all of them for contesting, clarifying, extending, and otherwise helping me to improve my argument. Needless to say, I alone am responsible for its flaws.

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> When the strident voices of the polemicists are still, when the grand systems of long-dead theologians fall away, when the sixteenth-century mutations of Christianity are seen entirely in historical context, then the Reformation will be regarded not only as Protestant and northern, but also as Christian and European.
>
> THOMAS A. BRADY, JR.[1]

The purpose of this essay is conceptual, not empirical. It offers no new facts. At least it does not do so in the sense in which the term 'facts' is usually understood, which is to say, as true statements about the past drawn in some demonstrable manner from some definite primary source or group of sources lodged in an archive or a library with an identifiable location. It rather aims to cast existing knowledge into a different mold. It does so by confronting two separate bodies of knowledge with each other in order to regard them from a single point of view. The two bodies of knowledge consist of Reformation historiography and medieval historiography. The single point of view takes the Reformation to stand in a direct line of continuity with European-wide developments beginning around the turn of the millennium, including the creation of a governmental church under the leadership of popes like Gregory VII, Alexander III, and Innocent III.

What makes this essay possible is that its author is neither a medievalist nor an early modernist: not a medievalist, because he spent the better part of his life in the professional study of early modern European history at the University of Chicago; not an early modernist, because he was trained as a medievalist in Heidelberg and at Columbia University in the seminars of Peter Classen, J. M. W. Bean, and John Mundy. His first book, focusing on William Durant the Younger (ca. 1266–1330), bishop of Mende and count of Gévaudan, made a sustained attempt to take the history of the conciliar theory out of a purely intellectual context in order to anchor it in the development of medieval social and political institutions broadly understood.[2] His second book, focusing on Hermann Conring (1606–81), professor of medicine and politics at the University of Helmstedt, examined the work of one particular early modern thinker in order to trace the limits of historical thought by turning historical methods {345 | 346} against themselves.[3] Having written books on either side of the traditional divide between medieval and modern history—on a medi-

1 Brady, "Social History," 176.

2 Fasolt, *Council and Hierarchy*.

3 Fasolt, *Limits of History*.

eval Catholic bishop thoroughly trained in canon law and nothing if not eager to maintain the dominance of the church, and on an early modern Lutheran polymath thoroughly conversant with methods of historical criticism and eager to establish freedom of conscience and religious toleration—has given him a definite perspective on the *longue durée* of European history that is not widely shared.

What makes this essay necessary is the damage done to historians' grasp of the *longue durée* of European history by the distinction between medieval and modern history. That damage goes much deeper than is commonly acknowledged. It does not affect social and economic history as directly as intellectual, cultural, and institutional history. It is less serious on the medieval side, where it tends to keep medievalists confined to a kind of intellectual ghetto in which they are content to address each other, occasionally frustrated by the failure of modernists to pay enough attention to medieval history, but generally secure in the knowledge—sometimes to the point of condescension—that this is not a problem for themselves, but for the modernists. The damage is more serious on the modern side, where it leads historians to overestimate differences between medieval and modern Europe, underestimate the extent to which modern institutions are indebted to the medieval church, and lose sight of what unites the European nations and has given them such a peculiar role to play in world history. It has not been nearly as successfully repaired as long-standing projects to build bridges from medieval to modern history have led historians to believe, and it continues to thwart an understanding of European history as a whole. There is a disconnect. The disconnect is not in European history, but in the historians—or so at least is the contention of this essay.

An essay of this kind is bound to provoke disagreements. It will do so for two very different reasons. One is that no single person can hope to master the entire range of knowledge available on subjects as broad as medieval and early modern European history. That may be sad, and it will irritate the specialists, but it is unavoidable. It is also entirely familiar and relatively easy to correct by readers who have the special knowledge that the author lacks. Its worst effects can be forestalled by apologies for the limits of their expertise and solicitations of criticism of the sort with which scholarly authors are properly accustomed to introduce their writings. I offer such apologies and solicitations here and now.

The other reason for disagreements is that this essay raises questions about the meaning of terms like 'medieval,' 'modern,' 'Europe,' and 'Reformation.' The answers to those questions depend to some degree on decisions that historians make about the proper way to use such terms. Such decisions are never

unanimous and they change over time. They can be justified and they can be explained, but they cannot be based entirely on empirical investigation or justified by offering a missing piece of information. Disagreements over questions of meaning are therefore more intractable than disagreements that arise from ignorance. They are especially intractable in history because historians are trained to base themselves as far as possible on something other than their own opinion, namely the evidence, and even more so {346 | 347} because the meaning of any terms they use can itself be viewed as a subject of historical investigation. Historians accordingly find it particularly difficult to treat questions of meaning in distinction from questions of fact. That leads to misunderstanding and confusion.

In order to reduce the potential for confusion, I offer a few preliminary clarifications. First, this essay is deliberately polemical in style. It is intended to provoke medieval and early modern historians into reconsidering and perhaps even abandoning some fundamental concepts to which this essay claims they are improperly endeared. Polemical formulations help in such an endeavor because they are clear, they focus the attention, and they tend to elicit strong responses. But they can be a hindrance if they are taken at face value or *ad hominem*. Let me therefore assure my readers of my hope and trust that they will not confuse rhetorically pointed formulations with what I take to be the truth about the past. Allow me also to affirm my respect for the scholars on whose work I shall touch below, no matter how polemical my tone. My attack is aimed at certain ways of thinking about the European past, not at the people whose ways they are.

Second, readers may wonder about the emphasis this essay places on the Reformation. Why not focus on the Renaissance instead? The reason is not that the Renaissance is any less important for the course of European history. The Renaissance started earlier and may well have affected the various areas of Europe more uniformly and more deeply than the Reformation. It may therefore carry a greater share of the historical responsibility for turning medieval into modern Europe than does the Reformation. The reason rather is that the problems the Renaissance poses for a grasp of European history as a whole are not as acute as those posed by the Reformation. P. O. Kristeller and his followers succeeded to a remarkable degree in showing how deeply the Renaissance was grounded in medieval history. Heiko Oberman, Bernd Moeller, and their followers tried to do the same for the Reformation, but without the same success. The work of Reformation historians retains a residual identification with nations and confessions that conflicts sharply with the perspective adopted in this essay. This is the problem that most needs to be addressed. So long as it has not been treated, it will remain impossible to recognize that both

Renaissance and Reformation are part and parcel of one and the same historical development.[4]

Third, readers may find my treatment of medieval history to be sketchy and thinly annotated, especially by comparison to my treatment of Reformation historiography. That is intentional. My purpose is not to offer new information about medieval history, but to confront a perfectly familiar view of medieval history with Reformation historiography. To say that it is perfectly familiar is not the same as saying that it is uncontroversial. Medievalists do not agree on it by any means, either in general or in details. But it is to say that it is neither new nor my own invention. Ernest Gellner, R. I. Moore, and Robert Bartlett have stated it in recent years with special force and {347 | 348} clarity.[5] Yet its basic ingredients—the importance of the transformation of European society in the tenth and eleventh centuries; the distinction between a local rural culture and a far-flung high culture of clerics, knights, and merchants; the role of the church in building institutions of European scope; the alliance between the clergy and the European aristocracy; the conflict between secular and regular clergy; the gradual development of monopolies of power; and the decline of medieval representative institutions—are old news. In varying combinations and with varying degrees of emphasis and elaboration they figure prominently in the work of medievalists as different from each other as Marc Bloch, Geoffrey Barraclough, Richard Southern, and John Mundy.[6] As long ago as 1939 Norbert Elias gave what remains the single most compelling account of their dynamic.[7] If there is anything new about the sketch of medieval history I offer below, it is the starkly abstract manner in which it puts some of the most familiar features of medieval history into bold relief and places them into a systematic relationship with each other—and with the Reformation.[8]

Fourth, this essay maintains that the changes occurring in the tenth and eleventh centuries are more important for understanding the course of European history as a whole than the Renaissance or Reformation. It thus proposes a

4 For an attempt to relate Renaissance and Reformation to each other see above, chap. 19. For a compatible perspective on the Renaissance see Monfasani, "Renaissance as Concluding Phase."

5 Gellner, *Plough, Sword, and Book*; Moore, *First European Revolution*; Bartlett, *Making of Europe*.

6 Bloch, *Feudal Society*; Barraclough, *Medieval Papacy*; Southern, *Making of the Middle Ages*; Mundy, *Europe in the High Middle Ages* (2000).

7 Elias, *Prozess der Zivilisation*.

8 For more about the reasoning behind that sketch and the evidence on which it is founded see Fasolt, *Council and Hierarchy*, and the literature cited there, as well as above, "Introduction," and chaps. 15–19.

periodization of European history in which the break supposedly dividing medieval from modern history loses its traditional significance. As Richard Southern put it, "the many-sided 'Investiture Controversy', . . . is the first major dispute in modern history."[9] But if it places the beginning of modern history in the eleventh century, it does so mainly for the sake of lifting the spell that confessional and national categories of historical interpretation continue to cast on the minds of historians. Its purpose is not to enter into empirical debates about demographic change, the revival of cities, the conditions of serfdom, the Gregorian Revolution, or any other of the many different factors that went into the "First European Revolution," much less the relative weight to be attributed to each of them. So long as readers can agree that it is no longer plausible to view the Reformation as the antithesis of the high medieval church as which it used to figure in both Protestant and Catholic ideology, the purpose of this essay will have been served.

In short, this essay is not intended to enlighten medievalists about the Middle Ages, or early modernists about the Reformation, but to put the former into conversation with the latter. It focuses on the Reformation in order to provoke both into reconsidering what exactly separates them from each other and perhaps allow them to realize how much more they have in common than they appear to think. It aims to show how odd it is for social historians *not* to view the Reformation as a direct continuation of basic historical trends—urbanization, the spread of literacy, the {348 | 349} formation of social and political monopolies, even Max Weber's inner-worldly asceticism—that began in the high Middle Ages. The medieval part is thin because medievalists sin by omission. They have their part of the story mainly right. They merely need to be encouraged to extend it into the early modern period. The early modern part is thick, because Reformation historians sin by commission. They need to abandon their faith in the line dividing the Reformation from the church of Pope Innocent III. If I may draw on Thomas Müntzer's useful formulation—useful both because it embodies an accurate insight and because the wrath roused by its author among Protestants and Catholics alike reveals how much they had in common—historians continue to deny the debt the "pope in Wittenberg" owed to the pope in Rome.[10] That denial needs to be confronted.

9 Southern, *Making of the Middle Ages*, 133.

10 In his *Vindication and Refutation*, Müntzer maintained that Luther had "set himself up in place of the pope" and called him the "Wittenberg pope." See Müntzer, *Collected Works*, 339.

1 Reformation Historiography

According to an old historical tradition the Reformation was made necessary by the corruption of the medieval church, begun by Martin Luther, carried forward by the German people, and driven by a new understanding of the Christian faith. It destroyed the unity of medieval Christianity, replaced good works and laws with faith and the Word of Scripture, put an end to the abuses practiced by medieval monks and clerics, freed the state from the yoke of ecclesiastical—especially papal—supremacy, and gave liberty to the individual. So understood, the Reformation marked an epoch in world history. Its significance was equaled only by the end of antiquity. *Reformatio* is an ancient term, and reformations were a dime a dozen throughout the Middle Ages.[11] But *the* Reformation was unique: it put an end to the Middle Ages and started modern history.[12] {349 | 350}

This description is brutally brief. But it suffices to capture two fundamental characteristics to which, according to the tradition, *the* Reformation owes its

11 Ladner, *Idea of Reform*; Constable, *Reformation of the Twelfth Century*; Frech, *Reform an Haupt und Gliedern*; Hamm, "Von reformatio zur Reformation."

12 For a classic formulation see Hegel, *Vorlesungen*, 492, and *Philosophy of History*, trans. Sibree, 412: "The Reformation resulted from the *corruption of the Church*. That corruption was not an accidental phenomenon; it was not the mere *abuse* of power and dominion. A corrupt state of things is very frequently represented as an 'abuse'; it is taken for granted that the foundation was good—the system, the institution itself is faultless—but that the passion, the subjective interest, in short the arbitrary volition of men has made use of that which in itself was good to further its own selfish ends, and that all that is required to be done is to remove these adventitious elements. On this showing the institute in question escapes obloquy, and the evil that disfigures it appears something foreign to it. But when accidental abuse of a good thing really occurs, it is limited to particularity. A great and general corruption of such large and comprehensive scope as a Church, is quite another thing.—The corruption of the Church was a native growth; the principle of that corruption is to be looked for in the fact that the specific and definite embodiment of Deity which it recognizes, is sensuous—that the external in a coarse material form, is enshrined in its inmost being. (The refining transformation which Art supplied was not sufficient). The higher Spirit—that of the World—has already expelled the Spiritual from it [i.e., from the church]; it [i.e., the church] finds nothing to interest it in the Spiritual or in occupation with it; thus it retains that specific and definite embodiment;—*i.e.*, we have the sensuous immediate subjectivity, not refined by it to Spiritual subjectivity.—Henceforth it [i.e., the church] occupies *a position of inferiority to the World-Spirit*; the latter has already transcended it." (Emphasis in the original; text in brackets added by the author.) Ibid., 417, Hegel sums up: "This is the essence of the Reformation: Man is in his very nature destined to be free."

singularity. They are, first, the break with Catholicism and, second, the break with the Middle Ages. Exactly how these breaks ought to be understood or why they occurred in Germany need not detain us here. It is enough to keep in mind that the tradition relies on two elementary distinctions. One is a theological distinction between Protestants and Catholics; the other, a chronological distinction between the Middle Ages and modernity. These distinctions are elementary in the specific sense that they are not simply empirical (though both distinctions do, of course, rely for their justification on empirical observations). They are rather analytically embedded in the very concept of *the* Reformation. Should it turn out that the distinction between Protestants and Catholics leaves something to be desired, and that the division of European history into a medieval and a modern phase is unsound, the concept of *the* Reformation—as if there were only one deserving the title in this emphatic sense—would disintegrate. *The* Reformation would have to be regarded as *a* reformation. It would undoubtedly retain its historical individuality, as is the case for every other thing in history, and it might well continue to claim greater significance than other reformations that came before or after. But it would no longer have the unique ability to mark the transition from the second to the third of the three phases into which tradition has divided the history of the world.

I am not sure who first invented the strange alloy of theological hostility with historical dogma from which the concept of *the* Reformation has been forged. I have no objections to regarding Ranke as the metallurgist in chief, so long as Hegel is not forgotten.[13] But I am certain that it has long since caused considerable pain in the heads of historians, not unlike the neuralgia that can be caused by dentists who put gold fillings next to silver-amalgam. Ever

13 Ranke, *History of the Reformation*. "[Ranke] believed, as did many others, that Protestantism was both a superior form of Christianity and the proper, even destined, religion of a modern German nation. This is the essence of the confessional-national view of the Protestant Reformation, which Ranke and his disciples made canonical in German historical writing." Brady, *Politics of the Reformation*, 1. {At the same time it is important to note that Ranke, like Hegel, gave the Reformation and the German nation not just national, but world-historical significance: "It is one of the greatest coincidences presented by the history of the world, that at the moment in which the prospect of exercising dominion over the other hemisphere opened on the Romano-Germanic nations of the Latin church, a religious movement began, the object of which was to restore the purity of revelation. Whilst other nations were busied in the conquest of distant lands, Germany, which had little share in those enterprises, undertook this mighty task." Ranke, *History of the Reformation*, 111–12.}

since the nineteenth century observers of European history and society as distinguished as Karl Marx,[14] Friedrich Engels,[15] Max Weber,[16] {350 | 351} Ernst

14 "Luther, without question, overcame servitude through devotion but only by substituting servitude through *conviction*. He shattered the faith in authority by restoring the authority of faith. He transformed the priests into laymen by turning laymen into priests. He liberated man from external religiosity by making religiosity the innermost essence of man. He liberated the body from its chains because he fettered the heart with chains. But if Protestantism was not the solution it did at least pose the problem correctly. It was no longer a question, thereafter, of the layman's struggle against the priest outside himself, but of his struggle against his *own internal priest*, against his own *priestly nature*. And if the Protestant metamorphosis of German laymen into priests emancipated the lay popes—the *princes* together with their clergy, the privileged and the philistines—the philosophical metamorphosis of the priestly Germans into men will emancipate the *people*. But just as emancipation will not be confined to princes, so the *secularization* of property will not be limited to the *confiscation of church property*, which was practiced especially by hypocritical Prussia." K. Marx, "Contribution to the Critique," 60–1.

15 "The German ideology of today sees in the struggles to which the Middle Ages had succumbed nothing but violent theological bickerings, this notwithstanding our modern experiences. Had the people of that time only been able to reach an understanding concerning the celestial things, say our patriotic historians and wise statesmen, there would have been no ground whatever for struggle over earthly affairs. These ideologists were gullible enough to accept on their face value all the illusions which an epoch maintains about itself, or which the ideologists of a certain period maintained about that period. . . . In the so-called religious wars of the Sixteenth Century, very positive material class-interests were at play, and those wars were class wars just as were the later collisions in England and France. If the class struggles of that time appear to bear religious earmarks, if the interests, requirements and demands of the various classes hid themselves behind a religious screen, it little changes the actual situation, and is to be explained by the conditions of the time." Engels, "Peasant War," 33–4.

16 "The emancipation from economic traditionalism appears, no doubt, to be a factor which would greatly strengthen the tendency to doubt the sanctity of the religious tradition, as of all traditional authorities. But it is necessary to note, what has often been forgotten, that the Reformation meant not the elimination of the Church's control over everyday life, but rather the substitution of a new form of control for the previous one. It meant the repudiation of a control which was very lax, at that time scarcely perceptible in practice, and hardly more than formal, in favour of a regulation of the whole of conduct which, penetrating to all departments of private and public life, was infinitely burdensome and earnestly enforced. . . . One of the fundamental elements of the spirit of modern capitalism, and not only of that but of all modern culture: rational conduct on the basis of the idea of the calling, was born—that is what this discussion has sought to demonstrate—from the spirit of Christian asceticism." M. Weber, *Protestant Ethic*, 36, 180.

Troeltsch,[17] Lucien Febvre,[18] and Norbert Elias[19] have, each in his own char-

17 "If we are seeking a purely historical definition of Protestantism, we soon recognise that, for Protestantism as a whole, it cannot be immediately formulated. For modern Protestantism as a whole, even when it carries on the orthodox dogmatic traditions, is in point of fact completely changed. The genuine early Protestantism of Lutheranism and Calvinism is, as an organic whole, in spite of its anti-Catholic doctrine of salvation, entirely a Church civilisation like that of the Middle Ages. . . . If all these considerations be taken into account, it becomes obvious that Protestantism cannot be supposed to have directly paved the way for the modern world. On the contrary, it appears at first, in spite of all its great new ideas, as a revival and reinforcement of the ideal of authoritatively imposed Church-civilisation, as a complete reaction to medieval thinking, which sweeps away such beginnings of a free and secular civilisation as had already been toilsomely established." Troeltsch, *Protestantism and Progress*, 34–5, 51–2.

18 "To seek within a tight circle of events and motives *the* starting point (as if, in fact, there had been only *one* starting point) of a movement as vast as the French Reformation developing within a country with a very rich intellectual civilization, and to fail to recognize the profound sources of an extremely powerful train of ideas and sentiments which, mixed up though they were with so many worldly interests, no objective researcher could subsequently fail to identify, means exposing oneself to scorn and the most fanciful interpretations—precisely those which confront one another in the texts we have quoted above. Worse still, it is then quite impossible to form a picture of the movement; its curve cannot be drawn because one did not begin with rigorous calculation of the initial co-ordinates." Febvre, "Origins of the French Reformation," 46.

19 Elias, *Civilizing Process*, stands out as one of the most sustained attacks on the notion that lies at the core of the traditional view of both Renaissance and Reformation: the notion of "the individual." Not coincidentally, in *State Formation and Civilization*, i.e., the second volume of *The Civilizing Process*, much less widely received than the first volume on *The History of Manners*, Elias worked hard to show that the rupture seemingly dividing medieval from modern history results from a failure to grasp long-term social processes. As he put it in the preface he wrote for the second edition of his work in 1968 in criticizing familiar accounts of the early modern self, ibid., 203–4: "We have here an example of how closely the inability to conceive long-term social processes (i.e., structured changes in the figurations formed by large numbers of interdependent human beings) or to understand the human beings forming such figurations is connected to a certain type of image of man and of self-perception. People to whom it seems self-evident that their own self (or their ego, or whatever else it may be called) exists, as it were, 'inside' them, isolated from all the other people and things 'outside,' have difficulty assigning significance to all those facts which indicate that individuals live from the first in interdependence with others. They have difficulty conceiving people as relatively but not absolutely autonomous and interdependent individuals forming changeable figurations with one another. Since the former self-perception seems self-evident to those subscribing to it, they cannot easily take account of facts which show that this kind of perception is itself limited to particular societies, that it comes into being in conjunction with certain kinds

acteristic manner, clenched their jaws and ground their teeth when forced to taste *the* Reformation. {351 | 352}

During the twentieth century their discomfort took hold of the historical profession. As early as 1903 Johannes Haller, the great Protestant historian of the papacy, found it so difficult to reconcile the evidence of the papacy's own records in the recently opened papal archives with Protestant attitudes towards the medieval church that he was never able to finish *Papsttum und Kirchenreform*, his book about the prehistory of the Reformation, and wrote a judgmental, well-informed, and justly celebrated history of the ancient and medieval papacy instead.[20] In the 1930s Geoffrey Barraclough followed suit by demonstrating in painstaking detail how misleading it is to condemn the medieval church for abuses without understanding the social and institutional realities with which it had to contend.[21] At about the same time Justus Hashagen accumulated abundant evidence to show how closely medieval secular and spiritual authorities collaborated in lording it over their subjects, confounding both the myth of the tyranny the medieval church supposedly exercised over the state and the belief that territorial church government developed out of the Reformation.[22] Once Bernd Moeller laid down his famous challenge to the stranglehold in which Protestant theologians had been holding the study of the Reformation, the floodgates were opened and a veritable deluge of historical scholarship washed over the landscape that Hegel and Ranke had cultivated.[23]

The results have been impressive.[24] Gone are the days when late medieval theology and church history could be dismissed as nothing better than a decline from the high standards set by Thomas Aquinas, a mere precursor to the glories of the Reformation, or a sad tale of superstition and abuse.[25] The late medieval church has come to be freed from the worst taints of corruption and can even be praised for the intensity of a devotion that was not necessarily

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of interdependencies, of social bonds between people—in short, that it is a structural peculiarity of a specific stage in the development of civilization, corresponding to a specific stage of differentiation and individualization of human groups."

20 Haller, *Papsttum und Kirchenreform*, v–x; Haller, *Das Papsttum*.

21 Barraclough, *Papal Provisions*, building on Stutz, *Eigenkirche*.

22 Hashagen, *Staat und Kirche*.

23 B. Moeller, "Problems," 3–16, first published in 1965.

24 For overviews, see Ozment, ed., *Reformation Europe*; Maltby, ed., *Reformation Europe II*; Hsia, ed., *German People*; Dixon, ed., *German Reformation*; Karant-Nunn, "Changing One's Mind." {Now also Scott, "Reformation," and especially Schutte, Karant-Nunn, and Schilling, eds. *Reformationsforschung.*}

25 Oberman, *Harvest*; Oakley, *Western Church*; Ozment, *Age of Reform*.

helped by Protestant intellectualizing.[26] A whole line {352 | 353} of scholarship has given medieval Catholic Christianity solid title to the very same promotion of liberty that once seemed an exclusively Protestant prerogative.[27] What used to be a sharp dividing line between the Middle Ages and the Reformation has been replaced by a fine appreciation for the continuities extending from the fourteenth to the seventeenth century. "Early modern history" or "late medieval and early modern history" have come to be favored designations for the period because they avoid an undue stress on rupture.[28] Precisely the same enhanced respect for continuity has entered deep into scholarship on the Italian Renaissance and Humanism.[29] That in turn has helped to highlight the degree to which Renaissance, Humanism, and Reformation were allies rather than opponents.[30] The plural "reformations" has become a popular alternative to the singular "reformation."[31] The history of the Holy Roman Empire has been extricated from nationalist narratives and reconstituted on more appropriate foundations.[32] Historians have highlighted the polycentric origins and full complexity of the "age of reform."[33] They have investigated the degree to which the Reformation owed its success to the particular conditions and

26 Pantin, *English Church*; Delaruelle, Labande, and Ourliac, *L'église 1378–1449*; B. Moeller, "Piety in Germany"; Bossy, *Christianity in the West*; Duffy, *Stripping of the Altars*.

27 Tellenbach, *Libertas*; Tierney, *Religion*; Tierney, *Idea of Natural Rights*; Oakley, "Legitimation by Consent"; Figgis, *Studies of Political Thought*.

28 What was started in the 1950s by Hassinger, *Werden des neuzeitlichen Europa*, has come to fruition in Brady, Oberman, and Tracy, eds., *Handbook of European History*. As Knowles put it in 1969, "Though hitherto all attempts have failed to remove the notional wall between medieval and modern, renaissance and reformation, individual historians, and the framers of courses at more than one 'new' university, have created a third, and hitherto nameless, historical period of change and birth between 1349 and 1648." Knowles, "Some Trends," 149–50.

29 Kristeller, *Renaissance Thought*; Witt, *Footsteps*; Monfasani, "Renaissance as Concluding Phase." {Now also Witt, *Two Latin Cultures*.}

30 Trinkaus, *"In Our Image and Likeness"*; B. Moeller, "German Humanists"; Trinkaus and Oberman, eds., *Pursuit of Holiness*; Bouwsma, "Renaissance and Reformation."

31 Haigh, *English Reformations*; Lindberg, *European Reformations*; Tracy, *Europe's Reformations*.

32 Vann and Rowan, eds., *Old Reich*; *Politics and Society in the Holy Roman Empire*; Walker, *German Home Towns*; Aretin, *Das Alte Reich*. {Now especially Brady, *German Histories*.}

33 "The beginnings of religious reform were polycentric and many-stranded. Confessional historiography has vastly distorted the full complexity of the 'age of reform,' as it should more correctly be called." Scribner and Dixon, *German Reformation*, 5.

aspirations of {353 | 354} late medieval German cities.[34] They have focused similar attention on the countryside, cast the study of the Peasants' War in entirely new forms, and debated whether urban and rural folk played basically similar or basically different parts in Reformation history.[35] They have studied the beliefs of ordinary people in unprecedented detail and turned their attention from the academic theories of intellectuals to forms of ritual and magic practiced in daily life.[36] They have asked whether the Reformation achieved its goals by changing the minds of ordinary people, and some of them have answered that it failed.[37] They have begun to pay as much attention to women as to men.[38] They have made new efforts to understand relations between Jews and Christians.[39] They have written histories of early modern Catholicism that emphasize Catholic attempts to reform the church, highlight similarities between Protestants and Catholics, and reveal what may be called the modernity of Catholicism.[40] They have proposed to view Reformation and Counter-Reformation as two parallel advances in a converging movement to impose Christianity more firmly on a population pagan or ignorant of Christianity at best.[41] Inspired by Max Weber and Gerhard Oestreich, they have {354 | 355} developed systematic theories of "confessionalization" and the imposition of "social discipline" that seek to rewrite the history of the early modern confessions—Lutheran, Calvinist, and Catholic—in a manner explicitly intended to remove confessional criteria from the prominent spot they used to occupy on the historical stage and focus attention instead on the degree to which

34 B. Moeller, *Imperial Cities*; Ozment, *Reformation in the Cities*; Brady, *Turning Swiss*; Hamm, *Bürgertum und Glaube*.

35 Blickle, *Revolution of 1525*; Blickle, *Communal Reformation*; Schulze, *Bäuerlicher Widerstand*.

36 Thomas, *Religion*; Scribner, *For the Sake of Simple Folk*; Scribner, *Religion and Culture*; Karant-Nunn, *Reformation of Ritual*; Koslofsky, *Reformation of the Dead*.

37 G. Strauss, *Luther's House*; Kittelson, "Successes and Failures"; Geoffrey Parker, "Success and Failure."

38 Roper, *Holy Household*; Wiesner, *Women and Gender*; Wunder, *He is the Sun*; Rublack, ed., *Gender*.

39 Hsia and Lehmann, eds., *In and Out*; Bell, *Sacred Communities*; Bell and Burnett, eds., *Jews*.

40 Jedin, *History*; Evennett, *Spirit*; Hsia, *World*; Bireley, *Refashioning*; O'Malley, *Trent and All That*.

41 "The hypothesis, therefore, which we should like to propose as a direction for research is the following: on the eve of the Reformation, the average westerner was but superficially christianized. In this context, the two Reformations, Luther's and Rome's, were two processes, which apparently competed, but in actual fact converged, by which the masses were Christianized and religion spiritualized." Delumeau, *Catholicism*, 161; cf. Van Engen, "Christian Middle Ages."

Lutherans, Calvinists, and Catholics were engaged in more or less the same social processes leading to more or less the same intensification of the authority of the state.[42] In short, historians today know how to speak in registers that range from religion and ideas to social science and cultural studies, in the language of Protestants no less than that of Catholics and non-believers, at length, with eloquence, and with heartfelt conviction about the historical iniquities embodied in theologically motivated forms of periodization.

Given such advances in historical scholarship and the doubts they have sown about the Hegelo-Rankean account of *the* Reformation in the innermost sanctum of the historical profession, one can well understand why many historians believe that the old alloy has long ago been melted down and is now being forged into a radically new perspective on the European past.[43] It seems as though the tyranny once exercised over Reformation scholarship by confessional and national ideologies had been defeated. But if one takes a closer look, the optimism with which contemporary historians tend to celebrate the gains they have made over the past half-century or so turns out to be not as well founded as one might think.

To be sure, overt assertions of the superiority of Protestantism over Catholicism or the reverse, not to mention allegations of the special service rendered by the German people to liberty and modernity, though they can still be hunted down in the nooks and crannies of alternative scholarly cultures, avoid the limelight they once sought. Professional historians know better than to risk being caught red-handed with the traditional interpretation of the Reformation as the revolutionary beginning of modern history. They tend to fear being tarred with the brushes of "romantic idealism," "the {355 | 356}

42 Zeeden, *Entstehung*; Reinhard, "Gegenreformation"; Reinhard, "Zwang"; Schilling, "Konfessionalisierung im Reich"; Hsia, *Social Discipline*; Headley, Hillerbrand, and Papalas, eds., *Confessionalization*. Cf. Oestreich, *Neostoicism*; Schulze, "Gerhard Oestreichs Begriff."

43 "The past decade of research has seen a retreat from a narrowly confessional 'religious history' of the Reformation, and much greater discussion about the broader context of religious reform. . . . The implications of such discussion for a general interpretation of the German Reformation have not yet been drawn out, and they often find little mention in general textbooks. However, they signal a radical change in our understanding of the Reformation and its importance for early modern European history." Scribner and Dixon, *German Reformation*, ix, initially written in 1986. "These two breakthroughs—the Reformation as a social movement and the Holy Roman Empire as dispersed governance—enable us to build a new, post-Rankean and postnational account of the German Reformation in the space created by the collapse of the confessional-national story." Brady, *Politics of the Reformation*, 3.

Reformation breakthrough," and "the Luther cult."[44] But the retreat of confessional polemics and nationalist self-assertion is not to be confused with the advance of a convincing alternative to Hegel. As soon as one asks just what "it" is whose social, cultural, and popular dimensions we now understand to be so much more complex and diverse than once upon a time, the answer still remains "the Reformation." If one asks where and when "it" started, the answer still focuses on Germany after 1517. Studies continue to proliferate that can be readily identified as Catholic or Protestant in inclination, and for the most part German, French, Italian, Spanish, and British historians continue to write about the Reformation in splendid isolation from each other. Even historians particularly closely identified with advancing the social history of the Reformation rely on national boundaries to define their subject matter.[45] The question why there were no Francophone Anabaptists hardly attracts any more interest today than it did a quarter of a century ago.[46]

The result is best described, not as a radical break with the confessional and national narratives of the nineteenth century, but as an extension and perhaps a deepening of the confusion and "uncertainty we feel towards the Reformation and its historical outgrowths" that Bernd Moeller diagnosed some four decades ago.[47] It is all very well to replace "Renaissance and Reformation" with "late medieval" and "early modern" history and to insist that the Reformation was

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44 "Applied to our field, it [romantic idealism] means the hegemony of theology over history in the form of the belief in the Reformation as the 'breakthrough' of an eternal 'Reformation principle,' rather than the appearance of new forms of European Christianity whose character and destinies need to be explained by historical causes. This I take to have been the fundamental idea of the Luther cult, whose ravages Professor Moeller himself has so ably described." Brady, "'Social History of the Reformation'," 41, replying to B. Moeller, "Stadt und Buch."

45 "If it is possible to summarize a movement as internationally and locally complex as the essays here have shown the Reformation to be, we must concede that diversity is a *leitmotif.* National context counted because it was exactly in the realm of local circumstances that the phenomenon of reformation was domesticated, made meaningful for people of different national, cultural or ethnic groups." Scribner, "Comparative Overview," 225. Cf. Scribner, *German Reformation* (1986).

46 When it was asked by Monter, "Reformation History," 6.

47 "I suspect therefore that the neglect of the Reformation by secular historians and, as Ebeling noted, 'the forgetting of Luther . . . by today's educated man,' reflect the same underlying cause, the widespread and basic uncertainty we feel toward the Reformation and its historical outgrowths." B. Moeller, "Problems," 4, with reference to Ebeling, *Luther*, 9. Secular historians no longer neglect the Reformation as Moeller thought they did when he wrote these words. But his diagnosis of the reason for their neglect of the Reformation applies equally well to the close attention they pay to the Reformation today.

more complex and diverse than we used to believe. But stressing the complexity of what used to be a simple picture is not enough to abolish the hold of the traditional interpretation of the Reformation over historians' minds; blurring the sharp chronological and confessional lines in the old picture is not the same as drawing a new picture. On the contrary, it hides the conceptual core that was forged for Reformation history in the nineteenth century and thereby aids in its survival.

> Nowadays, the place of the old revolutionary shift from medieval to modern has been taken by a gradual, fluctuating, {356 | 357} highly contextualized blending of "late medieval" with "early modern," the central phase of which unfolds in the fifteenth and sixteenth century,

as the editors of a highly influential handbook of European history put it in the mid-1990s.[48] That sounds as though the traditional interpretation had finally been laid to rest. But the quotation marks around "late medieval" and "early modern" and the survival of "Renaissance and Reformation" in the title of the work tell a different story: the old concepts can no longer be accepted, but no new ones are on offer that could take their place.

Nowhere is this more poignantly evident than in the study of confessionalization. The confessionalization paradigm is explicitly intended to leave traditional views behind. In fact, however, it reproduces them under a different guise. According to one of its leading proponents, "confessionalization" supports three main theses.[49] First, by treating Catholicism, Lutheranism, and Calvinism under a single heading, it refuses to recognize Reformation and Counter-Reformation as opposed and chronologically distinct processes and focuses attention instead on the many parallels in the history, especially the social history, of Protestant and Catholic territories from the 1520s all the way to the early eighteenth century.[50] Second, it identifies confessionalization as the "methodical establishment of large new groups," and attributes its success to

48 Brady, Oberman, and Tracy, eds., *Handbook of European History*, 1:xvii.

49 Reinhard, "Zwang," translated as "Pressures," at 173–4. Reinhard's views, though by no means undisputed, are influential enough to be taken as representative. For an excellent précis of the entire issue see O'Malley, *Trent and All That*, 108–15.

50 Ernst Walter Zeeden was the first to stress these similarities, but spoke of "Konfessionsbildung" rather than "Konfessionalisierung" and largely stayed within the limits of church history; see Zeeden, "Grundlagen," and Zeeden, *Entstehung*.

> 1 a return to clear theoretical ideas; 2 the dissemination and establishment of new standards; 3 propaganda, and the taking of measures against counter-propaganda; 4 internalization of the new order through education and training; 5 the disciplining of adherents (in the narrower sense); 6 the practice of ritual; 7 the influencing of language.[51]

And third, it highlights three crucial advantages the "emergent 'modern state'" derived from confessionalization for its development:

> 1 reinforcement of its national or territorial identity, both at home and abroad; 2 control over the church as a powerful rival of the new state power, and not least over church property as an important means of power; 3 discipline and homogenization of its subjects, for "confessionalization" was the first phase of what Gerhard Oestreich has called the absolutist "imposition of social discipline."[52]

This is an admirably clear account. But only one among its several features serves well to distinguish "confessionalization" from the history of Europe in the high Middle Ages. That feature is, of course, that the "large new groups" in question were marked by their identification with the very Catholic, Lutheran, and Calvinist confessions from whose differences the confessionalization paradigm is intended to abstract, as opposed to other kinds of large new groups that were methodically established in the Middle Ages, say, orthodox Latin Christians who accepted {357 | 358} transubstantiation, went to confession once a year, and bowed to the authority of the pope in Rome, the subjects of the king of Sicily, or the members of the Franciscan and Dominican orders. Everything else is perfectly familiar to medievalists. Gratian's *Decretum* and Peter Lombard's *Sentences*, not to mention Gregory VII's rebellion against the abuses that had undermined the purity of the church in the early Middle Ages, surely marked a return to clear theoretical ideas—just not Protestant ideas or the kind of return that Protestants would have approved. The Assizes of Clarendon, the canons of the Fourth Lateran Council, and the Constitutions of Melfi surely established new standards that were effectively disseminated—just not the standards established in the Augsburg Confession, the canons of the Council of Trent, or the Book of Common Prayer. The wars of words conducted during the Investiture Controversy, by Guelfs and Ghibellines, and by the publicists of Philip IV and Pope Boniface VIII were nothing if not propaganda and

51 Reinhard, "Pressures," 177–8.

52 Ibid., 183.

counter-propaganda. Students at medieval universities internalized the new order through education and training. Ritual was practiced: think of All Souls, Corpus Christi, and the cult of the Virgin Mary. Language was influenced: think of words like *Gewissen, Ablass*, 'crusade,' 'bank,' 'madam,' 'sir,' 'courtesy,' 'adventure.' There was no German word for 'conscience' until *Gewissen* was invented by a medieval cleric. There is hardly any region in medieval Europe where national and territorial identities were not reinforced or created for the first time, not to mention the various conquests by which Ireland, most of Spain, Sicily, the Holy Land, Byzantium, Prussia, and other regions on the periphery of Europe and beyond were assimilated to European culture. Temporal rulers seized control of church property wherever they could, held on to benefices, used crusading tenths for their own purposes, or arrested an entire military order, as Philip IV did with the Templars in one of the most spectacular state operations in medieval history. As far as discipline and homogenization are concerned, those were well underway as soon as medieval monks from Cluny or Gorze imposed their ascetic ways of life upon a recalcitrant secular clergy, medieval knights learned to follow a chivalric code of conduct, and usurers began to practice restitution—not to mention Dominican inquisitors and people like the villagers of Montaillou, who knew at least as much about discipline as Menocchio, the miller made famous by Carlo Ginzburg.[53] In short, judging by the criteria proposed as markers of confessionalization, excepting only the co-existence of several different confessions itself, confessionalization proceeded apace in medieval Europe.

Appearances to the contrary notwithstanding, the conceptual underpinnings of "confessionalization" thus turn out to be what they were for *the* Reformation: confessional and German. If confessionalization were to be taken seriously as a social process involving Europe as a whole, rather than one rooted in the traditional interpretation of the Protestant Reformation in Germany and presupposing {358 | 359} confessional differences, the word 'confession' would have to be removed from the name of the process in question, and the process itself could hardly be said to begin in the sixteenth century. It would have to be said to have already had a long history in 1297, when King Philip IV scored a signal victory over Pope Boniface VIII's attempts to protect the French clergy from royal pressure by closing the borders of his kingdom to the export of bullion to Italy.[54] It would be difficult not to see the papacy's government of central Italy

53 For the general argument see Moore, *Formation of a Persecuting Society*; cf. Murray, *Reason and Society*; Keen, *Chivalry*; Jaeger, *Origins of Courtliness*; B. N. Nelson, *Idea of Usury*; Le Roy Ladurie, *Montaillou*; Ginzburg, *Cheese and Worms*.

54 Strayer, *Reign of Philip the Fair*; Strayer, "France."

in the thirteenth century as analogous to the control Saxon princes sought to impose on their domains in the sixteenth century.[55] Pride of place in the history of confessionalization would have to be given to legislative measures like the Statute of Provisors, the Statute of Praemunire, and the Pragmatic Sanction of Bourges, by which the monarchs of England and France enhanced their control over the clergy and the religious lives of their subjects. The events of the sixteenth century would have to be characterized as the manner in which Germans tried to catch up with their Italian, French, and English neighbors' success in subjecting clerics to lay control, arriving late as usual on the historical scene, and all the more excited to get going. Why should the creation of new dioceses and archdioceses on the periphery of Carolingian Europe in the tenth, eleventh, and twelfth centuries, such as Magdeburg, Prague, Gniezno, Gran, Lund, Uppsala, Catania, Aversa, Toledo, and Lisbon, not to mention the occupation of Greek churches by Latin crusaders in the Byzantine East, not be regarded as part and parcel of confessionalization?[56] Because the confession was that of Latin Christianity? Why should the shift of general councils from Rome to Lyon, the many popes who hailed from France once Urban IV (r. 1261–64) had set the precedent, and the move of the papacy to Avignon not be regarded as evidence for the dexterity with which the French monarchy almost managed to seize the largest jewel in the crown of confessionalization's pursuit of state control over the church?[57] According to the confessionalization paradigm itself the answer may not be, "because Avignon caused disagreement among medieval Christians, not among Lutherans, Zwinglians, Calvinists, and Catholics," for that would presuppose the very theological distinctions the confessionalization paradigm is intended to supersede. But then what would the answer be? The periodization of confessionalization—contested, but never said to begin before the sixteenth century—tacitly presupposes Luther.[58]

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55 P. Partner, *Lands of St. Peter*; cf. Prodi, *Papal Prince*.

56 See Bartlett, *Making of Europe*, 5–18.

57 Oakley, *Western Church*, 32–8, pays special attention to the growing influence of France over the church since the first Council of Lyon in 1245. Revisionist historians may counter that neither Lyon nor Avignon were part of France, and that Pope Clement V was far from a spineless lackey of the French monarchy; cf. Menache, *Clement V*. That is true, but it was already well known to E. Müller, *Vienne*, and it is not the point. The point is that Clement V and his Avignonese successors had a harder time resisting French pressure than, say, Innocent III or Gregory IX.

58 The tension between the pan-European perspective of a social historian and a traditionally inspired focus on the sixteenth century, accompanied by an equally traditional belief in the unity of medieval Christianity and the importance of its destruction, is evident in Schilling, "Reformation and Rise," 21–2: "This analysis will assume a broader than

The {359 | 360} confessionalization paradigm amounts to a contemporary version of Hegel's vision of the modern state, minus Hegel's fondness for the sincerity of the German people and his distaste for Catholic corruption, plus the gloomy descent of Weber's inner-worldly asceticism and Oestreich's social discipline on ordinary folk in lieu of Hegel's happy rise of liberty.[59]

Small wonder that historians committed to the confessionalization paradigm find it difficult to decide whether it desacralized society, sacralized politics, or both.[60] Small wonder that historians committed to expelling *the* Reformation from the realm of respectable historical conversation find themselves compelled to readmit it through the backdoor, through which it enters in quotation marks, wearing humbler clothes and bearing a more modest demeanor, but otherwise unchanged.[61] The signs are everywhere. Historians

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normal context, for Lutheranism and German state building will be set in a framework of confessionalization and state building as universal phenomena of early modern Europe. . . . The term 'confessionalization' thus designates the fragmentation of the unitary Christendom (*Christianitas Latina*) of the Middle Ages into at least three confessional churches—Lutheran, Calvinistic or 'Reformed,' and post-Tridentine Roman Catholic. Each formed a highly organized system, which tended to monopolize the world view with respect to the individual, the state, and society, and which laid down strictly formulated norms in politics and morals."

59 "Despite Reinhard and Schilling's desire some fifteen years later [i.e., than the publication of Moeller's work on imperial cities in 1962] to put confessionalization into the realm of social-history discourse, their focus was still on the two institutions traditional in German historiography, the church and the state—precisely 'the two very dry elements' that Febvre wanted historians to transcend." O'Malley, *Trent and All That*, 110, with reference to Febvre, "Origins," 47.

60 "The most fundamental transformation in early modern Central Germany was the desacralization of society. By this I do not mean merely the secularization of social life, but an antithetical development to the process of sacralization in late medieval Germany." Hsia, *Social Discipline*, 183. "The new sacralization of politics, going hand in hand with confessionalization, meant a functional increase for the emergent modern state power. Theoretically and practically, the church became an integral part of the state, and in practice that was the case for the Catholic almost as much as for the evangelical church." Reinhard, "Pressures," 187.

61 "The Reformation began in Germany in the 1520s, with the 'Luther affair,' the controversy precipitated by Martin Luther's attack on indulgences and the indulgence trade in October 1517." Scribner, "Introduction," 1. "The ideological label 'the Reformation' has become too embedded as a description of a historical period for us to be able to dispense with it completely, but at least we can begin to mean by it a complex, extended historical process, going well beyond the endeavours of one man or one tendency, and involving social, political and wider religious issues." Scribner and Dixon, *German Reformation*, 5. "The shift forward of 'the turning point' to the eighteenth century has displaced the

whom editorial responsibilities compel to rely on language acceptable to all are forced to stoop to the lowest common denominator by claiming that the Reformation was . . . important.[62] General histories explicitly intended to incorporate {360 | 361} new scholarship on the Reformation sometimes combine it with conceptual claims about the uniqueness and liberating role of the Reformation that Hegel would have been proud to endorse.[63] Occasionally the underlying tensions break out into the open, dividing recent historians of the Reformation no less sharply from each other than confessional polemics used to do.[64] More conservative historians find it unnecessary to change their tune and may even gleefully insist that some of their intermittently disputed views have after all been proven right.[65] Theologically inclined historians have

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old pair, 'the Renaissance' and 'the Reformation,' as the double-sided hinge of European development, but it has by no means robbed the centuries from 1400 to 1600 altogether of a pivotal role. . . . 'The Reformation' still means the transformation and differentiation of western Christianity during the sixteenth century, but it can no longer stand for Motley's liberation of the world from priestcraft and superstition. Thus shorn of their former ideological freight, the concepts still retain distinct signatures as aspects of a world which was, at the same time, late medieval and early modern." Brady, Oberman, and Tracy, eds., *Handbook of European History, 1400–1600*, 1:xxi.

62 "One theme has persisted, even in recent Reformation historiography: the Reformation was a major event in European history. Whether viewed negatively as a disaster for flourishing medieval Christianity, or positively as the incisively liberating birth of modernity, with its appeal to conscience, the scholarly bottom line has remained clear: the events of the sixteenth century were of major import." Hillerbrand, ed., *Oxford Encyclopedia*, 1:x.

63 "By its original teaching and example, the Reformation, above all, encouraged people to resist religious tyranny; many scholars view it also as a major force for political freedom and social justice, at least before the Peasants' Revolt of 1525 worked to restrict its social promise. The Reformation was born of such resistance, and this has been its basic legacy." Ozment, *Age of Reform*, 437. "The Reformation, the movement which divided European Christianity into catholic and protestant traditions, is unique. No other movement of religious protest or reform since antiquity has been so widespread or lasting in its effects, so deep and searching in its criticism of received wisdom, so destructive in what it abolished or so fertile in what it created. . . . The unique quality of the protestant Reformation consists in that it took a single core idea; it presented that idea to everyone, and encouraged public discussion; it then deduced the rest of the changes to teaching and worship from that idea; and, finally, it tore down the entire fabric of the institutional Church and built again from scratch, including only what was consistent with, and required by, the basic religious message." Cameron, *European Reformation*, 1, 422.

64 See the disagreement between B. Moeller, "Stadt und Buch," and Brady, " 'Social History of the Reformation'."

65 {Elton, writing the introduction to volume 2 of the hugely influential *New Cambridge Modern History*, gave the Reformation the same world-historical significance that Ranke

not only survived, but are flexing their muscles.[66] Historians who try to change the subject {361 | 362} altogether are few and far between.[67] Fewer still are those who seek to do entirely without the concept "Reformation."[68]

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had given it a century before, only without the providential meaning: "Now both Italy and Germany stepped down. For some centuries the essential Europe—the expanding and conquering Europe—was to be found not in the centre, the south or the east, but exclusively in the west. This was a development to which much in the past led up and which must never be stressed to the exclusion of the continued significance and interest of other areas; but it came into the open during the early sixteenth century when the Reformation, and the collapse of Charles V's imperial ambitions, confirmed the decline of central Europe and furthered the rise of Spain, France and England." Elton, "Introduction" (1958), 22. In 1990 he reaffirmed his judgment with unconcealed glee:} "The first edition of this volume was written between 1953 and 1956, and the more than three decades since that time have witnessed an exceptional outburst of new research and fresh interpretations. Thus it has unquestionably become desirable to offer to readers and students a revised version of the Reformation story. Perhaps the volume should have been replaced by a totally new one, but so drastic a step was neither feasible nor yet, as it turned out, necessary. . . . In the course of the operation it became apparent that the bulk of the volume has survived the accidents of ageing remarkably well. . . . As a matter of fact—such things will happen—the passage of time and labour has helped to justify some of the interpretations which in between appeared to be called in much doubt. . . . in the upshot it looks as though the major effects of this half-century [1520–59] identified in the original (ch. 1 [of 1958]) still seem convincing. The end of the universal church, and the emergence of national states took their force from the backward-looking explosion touched off by Luther, and the age witnessed the unmistakable beginnings of European ascendancy over the habitable part of the globe." Elton, "Introduction" (1990), vii, ix–x.

66 "Thus it is time to affirm once again, with due appreciation for historical contexts, that theological ideas matter, and that theology may be a motor for historical events, and not just driven by them. To think otherwise is an anachronistic 'Alice in Wonderland' view of the Reformation in which theology is only the linguistic cloak for the Reformers' 'real' motivations. Indeed, it was precisely theology that enabled the reform impulse effectively to cross social and political polarizations. . . . The modern academic ideal of bracketing personal commitment in order to provide comparative and alternative views for discussion or on the supposition that all is relative or that content is discovered through dialogue was alien to the minds of most of our examples. Equally alien was the modern apologetic effort to make the Christian faith 'plausible'." Lindberg, "Introduction," 2–3, 4. Cf. Hamm, Moeller, and Wendebourg, *Reformationstheorien*, and Hendrix, "Rerooting the Faith."

67 Two such historians are Blickle, *Obedient Germans?*, and Delumeau, *Catholicism*.

68 John Bossy is one of them. He tries "to use it as sparingly as possible, not simply because it goes along too easily with the notion that a bad form of Christianity was being replaced by a good one, but because it sits awkwardly across the subject without directing one's attention anywhere in particular. Properly speaking, it is a term from the vocabulary of

In short, *the* Reformation is alive and well.[69] The scholarly efforts of the last half-century have produced many contenders for the throne upon which Hegel sat. The court in which he ruled is packed with rivals to the succession; but his throne is vacant. Where there ought to be a good conceptual alternative to the thesis that *the* Reformation made Man free, we meet with Hegel's ghost. All efforts to the contrary notwithstanding—and they are many, ingenious, well-documented, thorough, and rising to the most exacting standards of historical credibility—*the* Reformation is hanging on the neck of history like a vampire sucking the lifeblood from its veins without paying much attention to the most powerful exorcisms historians know how to perform. How come? What gives this concept its uncanny power to escape unscathed from the best weapons of critical historical examination?

2 Medieval Historiography

In order to give a plausible answer to this question it is necessary to turn to medieval history, especially the period around the turn from the first to the second millennium. For that period has come to play a role in medieval history not unlike the role the Reformation used to play in marking the beginning of modern history.

If one had asked a historian in the nineteenth century about the most important things that happened in Europe between the beginning of the tenth century and the end of the eleventh century, the answer would typically have included a few major ingredients: the collapse of the Carolingian Empire; the development of feudal government; the restoration of the Empire by the Ottonians; the assertion of papal supremacy by Pope Gregory VII; and

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ecclesiastical discipline, and means the restoration of some ideal norm, by the action of superiors, of the conduct of institutions and persons. It may be a necessary concept in the history of the Church as an institution; but it does not seem much use in the history of Christianity, since it is too high-flown to cope with actual social behaviour, and not high-flown enough to deal sensitively with thought, feeling, or culture." Bossy, *Christianity*, 91. Cf. Bossy, "German Reformation."

69 "It would not be accurate to say, as some do, that Renaissance and Reformation studies have given way to a field called early modern European history. Although, as I shall say further on, colleagues have increasingly diverse interests, the Reformation as a movement to rectify perceived wrongs within the Catholic Church and within the religious and cultural life of the people is still itself a subject of energetic investigation; the Reformation has by no means faded from the historical scene." Karant-Nunn, "Changing One's Mind," 1102.

the consequent struggle for world domination pitting the papacy against the emperor.[70] In the wake of Niebuhr, Ranke, and the {362 | 363} founding of the Gesellschaft für ältere deutsche Geschichtskunde and the *Monumenta Germaniae Historica* by Karl vom Stein in 1819, historians like Georg Waitz, Wilhelm von Giesebrecht, Heinrich von Sybel, and Julius Ficker set the standard for medieval history. What mattered to them and their successors—from Heinrich Brunner, Otto von Gierke, Ulrich Stutz, and Karl Hampe down to Fritz Kern, Heinrich Mitteis, and Geoffrey Barraclough—were the history of the nation, the constitution of the state, and the fate of the empire.[71]

There was of course much room for disagreement. Some historians regarded the identification of Germany with the Holy Roman Empire as an unmitigated disaster for the history of the German people, while others viewed it as a hallowed cause that gave Germans a glorious role to play in European history. Some viewed the ascent of the papacy as a perversion of Christianity, others as a crowning achievement in the struggle to bring salvation to mankind. The origins of feudalism were variously sought in the disintegration of monarchical government and Germanic forms of loyalty. Hegelians disagreed with Rankeans, liberal historians in Göttingen with nationalist historians in Berlin, and Catholic historians with Protestants. But most of them would have been united in the conviction that the first duty of historians of medieval Europe was to study the nation, the constitution, and the state—and to publish

70 There is an abundance of literature on individual nineteenth-century historians and on nineteenth-century historiography in general, but I know of no good study of nineteenth-century medieval historiography as such. Surveys such as Butterfield, *Man on His Past*, 62–141; Breisach, *Historiography*, 228–302; Gooch, *History and Historians*, 39–213; Iggers, *New Directions*, 3–42; and Kelley, *Fortunes of History*, do not go very far. Fueter, *Geschichte*, is still the most detailed. M. Bentley, ed., *Companion*, 105–246, "Part II: The Medieval World," is almost entirely limited to recent scholarship. Given the leading role by German medievalists and the *Monumenta Germaniae Historica*, one is better informed by studies like Fuhrmann, "*Sind eben alles Menschen gewesen*," and Deisenroth, *Deutsches Mittelalter*, or by consulting pieces like "German Schools of History," the article with which Lord Acton led off the first volume of the *English Historical Review*; Acton's obituary on "Wilhelm von Giesebrecht"; Powicke, "Presidential Address"; Stephenson, "Origin and Significance"; Ullmann, "Reflections"; and two nicely complementary articles published almost simultaneously by two very different medievalists, namely, Cantor, "Medieval Historiography," and Knowles' superb "Some Trends."

71 Waitz, *Deutsche Verfassungsgeschichte*; Giesebrecht, *Geschichte*; Schneider, *Universalstaat*; H. Brunner, *Deutsche Rechtsgeschichte*; Gierke, *Genossenschaftsrecht*; Stutz, *Geschichte*; Hampe, *Deutsche Kaisergeschichte*; Kern, *Gottesgnadentum*; and Mitteis, *Lehnrecht*. Barraclough, *Origins*, can be viewed as one of the last offshoots of this line of work.

critical editions of the sources shedding light on that history.[72] Not for nothing the *Monumenta Germaniae* {363 | 364} *Historica* features the sacred love of the fatherland in its motto "Sanctus amor patriae dat animum."

Under those circumstances the tenth and eleventh centuries could not but look more or less diametrically opposed to the Reformation. In the high Middle Ages, political power was dispersed to the feudal aristocracy; in the Reformation, centralizing monarchs were seizing political and military power from the aristocracy. In the high Middle Ages, the most important battle pitted the Empire against the papacy; in the Reformation, the most important battle pitted the Habsburgs against the Valois. In the high Middle Ages, medieval Christendom was spiritually united under the papacy; in the Reformation Christendom was divided into Catholic, Lutheran, and Calvinist confessions. In the high Middle Ages the European knighthood went on crusade to recover the Holy Land; in the Reformation, knights were fast losing their allure and the Ottomans were advancing up the Balkans to lay siege to Vienna. Catholic and Protestant historians disagreed over the question whether the Reformation was a good thing. But they were unanimous that it overturned the state of affairs that had obtained in the high Middle Ages.

Here, too, Hegel holds a conceptual key to the traditional perspective. The way he saw it, the high medieval opposition between a theocratic church and a feudal state marked the height of the antithesis between internal and external spirit in the history of the Germanic world. That antithesis, he was convinced, caused both the disintegration of the medieval empire and the corruption of the medieval church. It was not going to be overcome until all superficial efforts at reforming mere abuses had failed, until the wholesale corruption of both church and state had become indisputable, and the entire feudal system was torn up by the Reformation, root and branch. The Reformation blazed a trail for a new synthesis of internal spirit with external spirit that would culminate in the Enlightenment, the French Revolution, and the Prussian state. Because the Reformation overcame the antithesis between internal and external spirit that had characterized the high Middle Ages, the Reformation could itself be viewed as the historical antithesis to the high medieval thesis.[73] Hegel's views,

72 For a quick introduction to the mindset of the leading German historians at the time one can hardly do better than to read Heinrich von Sybel's "Vorwort" and the programmatic statements "Zur Charakteristik der heutigen Geschichtsschreibung in Deutschland" by Wilhelm Giesebrecht, Georg Waitz, Leopold Ranke, Georg Heinrich Pertz, and Gustav Droysen in the first volume of the *Historische Zeitschrift* 1 (1859): iii–v, 1–42.

73 "The *second period* [of the Germanic World] develops the two sides of the antithesis to a logically consequential independence and opposition—the Church for itself as a

of course, were hardly undisputed. But they do point to the conceptual links that tied the nineteenth-century understanding of high medieval Europe to the nineteenth-century understanding of the Reformation. {364 | 365}

Much has changed since then.[74] No respectable historian today would identify himself or herself with constitutional monarchy, nationalism, and Protestantism as freely as Heinrich von Sybel did in his editorial preface to the first volume of the *Historische Zeitschrift* by banishing "feudalism," "radicalism," and "Ultramontanism" from the realm of civilized historical discourse to which his journal was supposed to be devoted.[75] Where German histori-

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Theocracy, and the State for itself as a *Feudal Monarchy*. Charlemagne had formed an alliance with the Holy See against the Lombards and the factions of the nobles in Rome. A union thus arose between the spiritual and the secular power, and a kingdom of heaven on earth promised to follow in the wake of this conciliation. But just at this time, instead of a spiritual kingdom of heaven, the inwardness of the Christian principle wears the appearance of being altogether directed outwards and leaving its proper sphere. Christian Freedom is perverted to its very opposite, both in a religious and secular respect; on the one hand to the severest bondage, on the other hand to the most immoral excess—a barbarous intensity of every passion. In this period two aspects of society are to be especially noticed: the first is the formation of states—superior and inferior suzerainties exhibiting a regulated subordination, so that every relation becomes a firmly-fixed private right, excluding a sense of universality. This regulated subordination appears in the *Feudal System*. The second aspect presents the antithesis of *Church and State*. This antithesis exists solely because the Church, to whose management the Spiritual was committed, itself sinks down into every kind of worldliness—a worldliness which appears only the more detestable, because all passions assume the sanction of religion. The time of Charles V's reign—*i.e.*, the first half of the sixteenth century, forms the end of the second, and likewise the beginning of the *third period*." Hegel, *Philosophy*, 344.

74 Reliable information about twentieth-century medieval historiography is easier to find than is the case for the nineteenth century, in part because the prominent role of the *Annales* school helps to focus historiographical attention where it counts. See Cantor, *Inventing the Middle Ages*—reckless, but necessary reading; Powell, ed., *Medieval Studies*; Spiegel, *Past as Text*; Van Engen, "Christian Middle Ages"; Freedman and Spiegel, "Medievalisms"; Oexle, *Stand und Perspektiven*; and Goetz, *Moderne Mediävistik*. Also useful are the essays in "Part II: The Medieval World" in M. Bentley, ed., *Companion to Historiography*, 105–246. On the *Annales* see Burke, *French Historical Revolution*; Erbe, *Zur französischen Sozialgeschichtsforschung*; and Lyon, "Henri Pirenne." {See also the outstanding essay by Peters, "More Trouble with Henry," which I should never have overlooked when this piece was first published.}

75 "Diese Auffassung schliesst den Feudalismus aus, welcher dem fortschreitenden Leben abgestorbene Elemente aufnöthigt, den Radicalismus, welcher die subjective Willkür an die Stelle des organischen Verlaufs setzt, den Ultramontanismus, welcher die nationale und geistige Entwicklung der Autorität einer äussern Kirche unterwirft." Sybel, "Vorwort,"

ans used to be dominant, French, English, and American historians now hold much of the field. Where the scrupulous preparation of critical editions of previously unpublished sources used to command the highest honors in the profession, the honor now goes to historians who struggle most successfully with the complexities of historical interpretation. Late in the nineteenth century Karl Lamprecht was ruthlessly put down for daring to question the traditional focus on constitutional and political history.[76] Since then social and economic historians have turned the tables on Lamprecht's intellectual opponents. Henri Pirenne blazed a trail by unsettling the traditional periodization of medieval history and drawing attention to the economic role of towns in the high medieval transformation of European economy and society.[77] With the founding of the *Annales* in 1929 Marc Bloch and Lucien Febvre broke the pattern established by the foundation of the *Monumenta Germaniae Historica* a century before not just for medieval, but for all of history. Bloch's work on medieval agriculture and feudal society developed a picture of medieval society that nineteenth-century historians of states and constitutions had not been able to imagine.[78] After World War II there followed a great outburst of {365 | 366} scholarly creativity by Bloch's and Febvre's followers in France and elsewhere that enormously expanded the territory of historical investigation.[79] More recently historians like Caroline Bynum and John Boswell have turned historians' attention to questions of gender, sexuality, and the body.[80] Questions of method continue to proliferate and change proceeds apace.

Not that historians have forgotten the empire, the nation, the state, or the church. But politics and ideas no longer dominate the understanding of high medieval history as they once used to do, and even where they occupy the center of attention, they have taken on a very different hue. Bloch's own early work *The Royal Touch* focused on monarchy, but viewed it from an anthropological perspective.[81] Percy Ernst Schramm and Ernst Kantorowicz fused

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iii. For Waitz's agreement with Sybel see Giesebrecht, Waitz, Ranke, Pertz, and Droysen, "Zur Charakteristik," 20, 26.

76 Lamprecht, *Deutsche Geschichte*; Chickering, *Karl Lamprecht*.

77 Pirenne, *Mahomet et Charlemagne*; Hübinger, ed., *Bedeutung und Rolle*; Hodges and Whitehouse, *Mohammed*; Pirenne, *Medieval Cities*; Pirenne, *Early Democracies*; Lyon, *Henri Pirenne*.

78 Bloch, *Feudal Society*; Bloch, *French Rural History*.

79 E.g., Duby, *Three Orders*; Duby, *Knight, Lady, Priest*; Le Roy Ladurie, *Peasants*; Le Roy Ladurie, *Montaillou*; Le Goff, *Birth of Purgatory*; Herlihy, *Medieval Households*.

80 Bynum, *Holy Feast*; Bynum, *Resurrection*; Boswell, *Christianity*; N. Partner, Bennett, Caviness, et al., "Studying Medieval Women"; J. L. Nelson, "Family, Gender, Sexuality."

81 Bloch, *Royal Touch*.

the study of monarchy and the state with that of religion and liturgy.[82] Gerd Tellenbach transformed the Investiture Controversy from a papal seizure of temporal power into a revolutionary struggle over the right order of the world in which the church at last succeeded in achieving liberty from the tutelage to secular powers to which it had been condemned since early medieval times.[83] Herbert Grundmann focused on medieval religion beyond the institutions of the church.[84] Otto Hintze examined feudalism from a world historical perspective as a precondition for modern representative government, while Theodor Mayer and Otto Brunner redefined the study of the medieval state as a kind of social history.[85] Charles Homer Haskins found a Renaissance in the twelfth century, long before the Italian revival of antiquity that commonly goes under that name, and Giles Constable found a Reformation in the {366 | 367} same century.[86] Joseph Strayer saw the makings of modern states in thirteenth-century France and England.[87] Brian Tierney traced the roots of natural rights and democratic thought to the work of twelfth-century canon lawyers.[88] The study of ideas has been entirely transformed in method and subject matter.[89] Wherever you look the turn to social history has laid the nineteenth-century view of medieval history to rest.

If one were to ask a historian today about the most important changes that happened in Europe between the beginning of the tenth century and the end of the eleventh century, a typical answer would therefore be quite different from what it would have been a hundred years ago. It would have to include the resumption of population growth after the long decline that set in during late antiquity, the revival of the economy and trade, the establishment of a society of peasants governed by priests, knights, and townsmen, the creation of an urban European culture, either on the foundations of ancient urbanism laid in those parts of Europe that had been included in the Roman Empire, or by the founding of new cities in Europe east of the Rhine and north of the Danube, and the expansion of Europe beyond its Carolingian borders. "Feudal anarchy" has long since disappeared and more recently feudalism itself seems to have disintegrated under the withering impact of close scholarly scrutiny.[90] A good

82 Schramm, *Kaiser, Rom und Renovatio*; E. Kantorowicz, *King's Two Bodies*.

83 Tellenbach, *Church, State and Christian Society*.

84 Grundmann, *Religious Movements*.

85 Hintze, "Preconditions"; Mayer, "Ausbildung"; O. Brunner, *Land and Lordship*.

86 Haskins, *Renaissance of the Twelfth Century*; Constable, *Reformation*; cf. Benson and Constable, eds., *Renaissance and Renewal*.

87 Strayer, *Medieval Origins*; Strayer, *Reign of Philip the Fair*.

88 Tierney, *Religion*; Tierney, *Idea of Natural Rights*.

89 Murray, *Reason and Society*; Clanchy, *From Memory*; Carruthers, *Book of Memory*.

90 E. A. R. Brown, "Tyranny"; S. Reynolds, *Fiefs and Vassals*.

way to characterize the high Middle Ages now is to refer to them as *The Making of the Middle Ages, The Making of Europe*, or *The First European Revolution*, to quote the titles of three different, but complementary books each of which views the period in question as a decisive transformation in the history of European society as a whole.[91] Historians of course continue to disagree. How exactly is the "First European Revolution" to be dated, and what, if anything, made it a revolution?[92] When exactly did population growth resume? Can one really do without the concept of feudalism? Just how did the relations between men and women change? Debates about such questions will continue. But one fundamental point is certain: the high Middle Ages can no longer be regarded as the antithesis of the Reformation.

The turn from "constitutional" to social history thus has removed the central justification for the traditional understanding of the relationship between the Reformation and the Middle Ages. Yet neither medievalists nor early modernists have so far quite {367 | 368} appreciated the implications of this straightforward fact. They now have less respect for the religious and political changes brought by Renaissance and Reformation, and more for the reorganization of European society around the turn of the millennium, right in the middle of what once used to be regarded as an unbroken continuum of a thousand years of medieval history.[93] But they seem not yet to have noticed that the turn to social history has raised a far more basic question about the relationship between the Reformation and the Middle Ages than can be answered by digging into the social history of late medieval Europe or by substituting "early modern" for "Renaissance and Reformation." Since it is no longer plausible to view the Reformation as the antithesis of the high Middle Ages, does that perhaps allow us to locate its beginnings in the very developments to which it was ostensibly opposed? Might it not be the case that the Reformation stands in

91 Southern, *Making of the Middle Ages*; Bartlett, *Making of Europe*; Moore, *First European Revolution*.

92 See, for example, Bois, *La mutation*; Bisson, "Feudal Revolution"; Barthélemy and White, "Debate"; Reuter, Wickham, and Bisson, "Debate"; and Landes, "Fear."

93 As Knowles put it almost forty years ago, at the same time when the social history of the Reformation was really taking off, "This insistence on movement and change is perhaps the greatest single revolution in medieval historiography. Even now, in some educated non-historical circles, medieval is still used as an umbrella-word, usually in a pejorative sense, indiscriminately of any action or theory in existence between 500 and 1500 A.D., and sixty years ago a global view of this kind was common even in popular historical writings. Today it is universally accepted not only that thought and institutions were never wholly static, least of all after 1000, but also that the movement of ideas and behaviour was not always from the barbarous to the civilized and from the uncouth to the beautiful." Knowles, "Some Trends," 149.

direct continuity to the "first European revolution"—that Martin Luther was the true heir of Pope Gregory VII?

3 A Conjectural History of the Reformation

A history of the Reformation that begins in the eleventh century does not exist. There are of course historians who begin their histories around the year 1000 and continue further than the Reformation. Good examples come from social and economic history, as well as world historians, whose distant perch makes them more sympathetic to the concept of a "First European Revolution" and less likely to become embroiled in Reformation controversies.[94] Legal historians seem specially inclined to share that point of view.[95] A few unusual people have made creative, not to say idiosyncratic, attempts to grasp the history of European civilization since the eleventh century as a whole.[96] {368 | 369} There are also countless textbooks that purport to treat the entire history of Western Civilization or one of its dimensions, especially the history of ideas, from a coherent point of view.[97] Yet none of them treat the Reformation as an extension of developments beginning around the turn of the Millennium. Even the most widely admired works of the greatest historians in the *Annales* tradition reproduce the divide between medieval and modern history with a surprising clarity.[98]

Where no such history exists, it can only be conjectured. The most effective way for doing so would seem to be to draw on the concepts that anthropologists, social scientists, and world historians have developed to distinguish the great agrarian civilizations from the two other main forms of society that

94 Cipolla, *Before the Industrial Revolution* (1993); Gerhard, *Old Europe*. For a compatible periodization, but seen from the angle of antiquity or in the rearview mirror of modernity, see P. Brown, *Rise of Western Christendom*; Fried, *Weg in die Geschichte*; Laslett, *World We Have Lost*; and Blum, *End of the Old Order*. {See also Wickham, *Inheritance of Rome*, and Wickham, *Framing the Middle Ages*.} For world historians, see W. H. McNeill, *Shape of European History*; J. M. Roberts, *Penguin History*, 458–88; cf. J. H. Bentley and Manning, "AHR Forum."

95 Bellomo, *Common Legal Past*; Wieacker, *History of Private Law*; Tierney, *Religion*; Berman, *Law and Revolution*; Berman, *Law and Revolution II*.

96 Rosenstock-Huessy, *Out of Revolution*; Elias, *Prozess der Zivilisation*; Heer, *Aufgang Europas*.

97 E.g., W. H. McNeill, *History of Western Civilization*; Le Goff, *Birth of Europe*; Copleston, *History of Philosophy*; and Lovejoy, *Great Chain of Being*.

98 Bloch, *Feudal Society*, stayed on this side of the divide; Febvre, *Problem of Unbelief*, and Braudel, *Mediterranean*, stayed on the other.

human beings are known to have created: the so-called primitive societies of hunters and gatherers that were the norm throughout the Paleolithic and only very few of which survive, in much attenuated forms, in a few corners of the world; and the intensely urbanized societies of the modern industrial world with their unprecedented technologies and population size.[99]

Ernest Gellner has applied those concepts with brilliance and concision.[100] In the typical large-scale agro-literate society there is, on the one hand, a vast majority of the population—usually well over ninety percent—that is spread over the whole area under cultivation but subdivided into relatively small and well-defined groups of villagers or "peasants." These are the agricultural producers. They owe their livelihood to agriculture; they have no say in politics; and they are relatively clearly separated from each other, not so much by geographic distance or difficulties of transportation as by habits, customs, usages, dialects, languages, and other markers of cultural difference that vary significantly from one place to another and give each of these relatively little groups their own uniquely local style of life.[101]

On the other hand, there is an elite. The elite is normally divided into two or three main groups that correspond to the main instruments of power: the sword, the book, and money. These groups tend to be arranged in relationships of hierarchical subordination that divide them as sharply from each other as from the mass of the population as a whole: a military aristocracy equipped with weapons and well trained in the arts of war; a literate clerisy that knows how to read, write, and keep records; and merchants and traders who know how to draw power from commercial and monetary {369 | 370} forms of exchange. The elite makes up only a small part of the total population—somewhere near five or ten percent at most—but, barring sporadic disturbances, scandals, crises, rebellions, the decline of old families, the rise of new families, and the occasional collapse of whole societies, it exercises firm control over the rest, has more or less the same customs everywhere, speaks more or less the same language wherever it is encountered, and thus displays a cultural cohesion across the entire space it dominates sharply contrasting with the cultural variety characteristic amidst the subject population.

Thus there are on the one hand countless small settlements dotting a countryside whose inhabitants lead roughly the same kind of rural life, but who will feel like strangers as soon as they venture beyond the limits of their homes for

99 See Childe, *Man Makes Himself*, and Crone, *Pre-Industrial Societies*, on agrarian societies and the Neolithic Revolution. Nomads are a special case; see Khazanov, *Nomads*.

100 Gellner, *Plough, Sword, and Book*; cf. Gellner, *Nations and Nationalism*.

101 Le Roy Ladurie, *Montaillou*, offers a famously vivid account of such a community in medieval Europe; cf. Rösener, *Peasantry*.

more than a handful of miles (what Gellner called "laterally insulated communities of agricultural producers"), and on the other hand knights, monks, and merchants (Gellner's "stratified, horizontally segregated layers of military, administrative, clerical and sometimes commercial ruling class") who conduct themselves in ways that differ both from each other and from those of the agricultural producers, but who are linked to all other members of their social kind across the whole extent of their society, each by the ties in which they specialize: marriage, dynasty, control over land, and military competition for the aristocracy; letters, symbols, books, and sacred rites for the clerisy; and commerce, industry, and money for merchants and traders.[102] They do not only have much more in common with each other than with the mass of the population, and therefore understand each other better than the rest (on whom they often look down with noble, ecclesiastical, or bourgeois contempt), but they also encounter little trouble in exercising their specific function—war, sacred rites, and trade—in the same way wherever they may go. They can travel far and wide without feeling like strangers; their peers will understand them everywhere; and they are not (yet) divided from each other by the political and cultural boundaries surrounding modern states.

The energy that fueled the development of Europe within this frame was owed to the rural population; they literally cultivated Europe. But their society was shaped by the competition over wealth and power in which the nobility, the clerisy, and the merchants were constantly engaged.[103] These three competitors concluded a kind of tacit social contract—never articulated in those terms, but for that very reason more effective in reality than social contracts imagined by early modern theorists—according to which the exercise of power was divided into three clearly demarcated spheres. That yielded untold benefits to each because it gave all of them the right and liberty to expand their power within their special sphere of action as they saw fit, and at the same time protected them from each other. It was a straightforward way of dividing the spoils of power.[104] {370 | 371}

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102 See the diagram of "the general form of the social structure of agrarian societies" in Gellner, *Nations and Nationalism*, 9; cf. Moore, *First European Revolution*, 188–98.

103 Elias, *Civilizing Process*, is excellent on competition among the military aristocracy, but says very little about competition among the clergy (between secular and regular clergy) or merchants and traders (between patricians and artisans). On that subject see Murray, *Reason and Society*.

104 As Mundy put it, "From the days of the Gregorians until the turmoil of the fourteenth and fifteenth centuries, Europe was led by an inadvertent but real alliance between the rural and urban well-to-do and the churchmen under the See of Peter." Mundy, *Europe in the High Middle Ages* (2000), 13.

In order to guarantee that the agreement would be kept, each offered a pledge: the clerisy gave up the right to progeny and vowed celibacy; the aristocracy gave up the right to lands held by the clerisy and vowed fealty; and the merchants gave up the right to usury and vowed to make restitution. In return the aristocracy received the support of the clerisy in its adoption of primogeniture and the concentration of power over Europe's real estate in the hands of an increasingly well-defined set of dynastic families with European standing that were closely related to each other by ties of blood and marriage; the church received the support of the aristocracy in holding most of the remaining real estate in mortmain and taking the leading cultural, legal, and symbolic role in Europe; and merchants were given the right to carry out their trade for profit without having their reputations ruined, and to travel to fairs and markets without having their business disturbed by military raiders.

Naturally these terms were often violated. Knights did use violence against clerics and merchants; clerics did traffic in temporal power; and merchants did practice usury and buy absolution. Such violations make for some of the most exciting reading in the early history of Europe. But they are exciting only because they were scandalous exceptions from the norm. Like all scandals they distract from the substance of what was going on. The substance consisted of competition of knights with other knights, of clerics with other clerics, of monks with other monks, and of merchants with other merchants, while peasants were tilling the land for all. Compared to the intensity of the competition that characterized relations within each of the leading orders, relations between them looked like peace itself.[105]

This competition shaped political, ecclesiastical, and economic affairs. It went through three major phases. It began with the enormously creative and enthusiastic development of new institutions in the eleventh and twelfth centuries, at a time when the members of each group saw countless opportunities

105 As Strayer, *Reign of Philip the Fair*, 237–8, 249–81, has shown particularly strikingly for the relationship between the king of France and the papacy; cf. Fasolt, *Council and Hierarchy*, 55–6, 80–3, 101–11, 287–90. For an articulate statement of the general argument see Mundy, *Europe in the High Middle Ages* (2000), 13–18, 24, 34–6, 199–233, 355–70. The same basic point was already well documented by Hashagen, *Staat und Kirche*. Competition among knights and burghers is widely known but, misled by stereotypes about the unity of medieval Christendom, modern historians have never recognized the fierce battle between the regular and secular clergy as a threat to the unity of medieval Christianity no less potent than the later battles between Protestants and Catholics; see Schleyer, *Anfänge des Gallikanismus*; Congar, "Aspects ecclésiologiques"; and Tierney, *Origins of Papal Infallibility*. It is worth recalling that the indulgence controversy began when an Austin friar (Martin Luther) locked horns with a Dominican friar (Johannes Tetzel) allied to a secular cleric (Albrecht of Brandenburg, Archbishop of Magdeburg and Mainz).

for making their fortunes in their own particular sphere of activity without having to step on the toes of their co-competitors in one of the other groups. One may call this the happy time of medieval history, when there was endless room for making plans and changing the world: the time of building cathedrals, creating canon law, founding cities, settling new lands, going on crusade, and so on. In the thirteenth and fourteenth centuries the competition entered a phase of bitter social strife in which each group was split into factions disputing each other's right to what appeared to be increasingly scarce resources, when opportunities were dwindling and the world proved recalcitrant to change. Increasingly the factions failed to keep the peace; increasingly they looked for allies {371 | 372} in one of the other orders to gain the upper hand over the other faction; increasingly the social contract was at risk. This is the unhappy time in medieval history: the time of patricians fighting with artisans for urban power; of knights feeling the heels of princes on their necks and objecting to the arrival of thoroughly ignoble mercenaries on the scene; of priests and bishops fighting with monks and friars for the support of the papacy; and not least the time of famine, the Black Death, the Hundred Years War, the Great Schism, and peasant unrest. It ended in the fifteenth and sixteenth centuries with the appearance of monopolists of power who managed to extricate themselves from the constraints of competition, to rise above their social peers for good, and thus to introduce new rules to the entire game. Great Italian dynasties who put an end to late medieval social strife by forcing their fellow citizens and neighboring cities under their own tyrannical control, like the Este in Modena and Ferrara, the Visconti and Sforza in Milan, and the Medici in Florence; the kings of England, France, and Spain, who learned how to subdue their aristocratic peers by means of standing armies and taxation once the great crisis of the Hundred Years War had passed, the Wars of the Roses were over, and the Reconquest of Spain was complete; and not least the pope, who, just as soon as the Great Schism was resolved and the Council of Basel had petered out, asserted the power of his monarchy over bishops and monastic orders, gave it a modern shape at the Council of Trent, and thus transformed himself into a sovereign prince quite different from anything that Gregory VII or Innocent III would have been able to envision—all of these document the grand theme of late medieval and early modern European history: the turn from oligarchic competition by estates to monarchical monopoly.[106]

106 The most lucid account of "the monopoly mechanism" known to me is the second chapter ("On the Sociogenesis of the State") in the second volume ("State Formation and Civilization") of Elias, *Civilizing Process* (1994), 335–439. For a classic characterization of

The appearance of monarchical monopolists shook the social and cultural frame in which the development of Europe had so far taken place to an extent that had not been witnessed since the First European Revolution. Their methods were by no means new: they relied on military force, commercial wealth, and the same capacity to keep records, devise and raise taxes, and manipulate laws that had been pioneered by their high medieval predecessors. But they intensified those methods to a point where they could turn them to new uses. On the one hand, they put an end to the kind of competition that had hitherto confined their attention to the limits of their own social sphere. By turning peers into subjects, they shook off the most irksome constraints imposed on them by their social competitors and gained the ability to move with unprecedented liberty of action. That liberty is visible in all the diplomatic, military, commercial, and spiritual upheavals of early modern times. On the other hand, each of the new monopolists had more in common with every other member of his set than with their subjects or with whatever allies they had formerly found in social strata other than their own (such as the nobility had found among the bishops, or the friars among the merchants). Though they arose from different layers of society, they entertained the same desire to achieve sovereign control over their lands, to codify the criminal and civil laws with which to rule their subjects, and to devise international laws with which to {372 | 373} regulate war and peace with other sovereign rulers. They shared a common interest in staking out their own domains by drawing new boundaries, cutting vertically, as it were, through a single cultural space, slicing it into the territorial pieces we call states, and flattening the horizontal layers of which society had so far been composed. Not least, they had the same desire to take the cultural lead from the church in order to be able to keep the clergy under their own control.

As a result the tacit social contract that clerics, knights, and merchants had made with each other in the tenth and eleventh centuries was replaced by a new social contract, equally tacit, between the monopolists who had escaped from the old terms. They agreed to divide the spoils of the Roman church between them, support each other's right to exercise sovereign power over their subjects—over noblemen, clerics, and merchants alike, without distinction or respect of social rank and order—and renounce the right to interfere without good cause in territories ruled by other members of their set. The boundaries that had hitherto divided aristocracy, clergy, and merchants from each other, and all of them from peasants, were not simply abolished. But they

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the same process from the perspective of an *Annales* historian see the account of "towns, witness to the century" in Braudel, *Mediterranean*, 1:325–52.

lost their significance to novel boundaries that divided Europe increasingly clearly into states and nations.

That required a thorough renovation in the entire European house, from the cellar to the attic, in the garden and the yard. The clerical renunciation of the right to procreation, the noble renunciation of claims on the estates of the church, and the mercantile renunciation of usury now lost their meaning and fell into disuse. The hierarchical society of early Europe that had defined both the kind and the location of the specific power to which each social order had been entitled needed to be divided by territorial boundaries in order to clarify how far the power of each monopolist extended and where it met the equal power of his peers. The relationships of sub- and super-ordination among clergy, nobility, and merchants needed to be reconfigured so that they could be reconciled with the new kind of power exercised over all of them by monarchical monopolists. Hitherto the equality of human beings had been secured by a form of Christianity that gave equal access to the sacraments to all who confessed their sins and obtained absolution. That had helped to neutralize the all-too-obvious inequities of a hierarchy subordinating serfs to free people, women to men, vassals to lords, and laity to clergy.[107] Henceforth equality would be secured through the belief in a shared human nature that bestowed equal natural rights on all who obeyed the law. Natural rights thus neutralized the no-less-obvious inequities embedded in political and social functions differentiating the subjects of the new monopolists from each other in private and in public life—so long at least as each was granted the right to give their individual consent, the chief sacrament in the modern church. Thus Christians became Italian, German, French, English, or Spanish; the knight became a soldier, the cleric a bureaucrat, the merchant an entrepreneur, and everyone the subject of a state. Hierarchy gave way to the division of labor, social rank gave way to social function, service to God became service to nature, and the church was turned into the nation. {373 | 374}

This transformation affected Europe as a whole. It is reflected in the territorial expansion of Europe into other continents no less than in the new scientific discoveries; in the relationships between the sexes no less than the relationship between rulers and ruled; the changed standing of the Jews and the new dignity awarded to the father of the house; the art of the Renaissance and the silver mines of Saxony. The invention of three-dimensional painting is a nice example because the third dimension endows the place of the observer so clearly with the right to a monopoly to which all subjects represented in the

107 One of the basic points made by Bossy, "Mass as a Social Institution."

painting have to bow.[108] The transformation did not occur once and for all, but a thousand times, in steps both small and large that kept being made throughout early modern times and led in different regions with varying degrees of speed along completely different paths crisscrossing all over Europe and covering it with intricately detailed patterns of human thought and action. Those patterns are not nearly as well understood as one might think after two centuries of professional historical research.[109] Their study has been brushed aside by historians preoccupied with tracing the origins of one or another modern nation and one or another modern faith. Illuminating them in more detail is one of the most urgent desiderata for historians seeking to grasp the place of the Reformation in the history of Europe. For the purposes of this essay the following sketch, as rough as it is incomplete, will have to do.

In Italy so much power had for so long been exercised by highly urbanized mercantile elites that it is virtually impossible to speak about the Italian aristocracy in separation from banking, business, and trade. The splendid residences within the perimeters of the Italian towns speak for themselves. In Italy urban elites had managed at a particularly early time to create monopolies that were perhaps not always large in terms of geographical extent, but were remarkably successful instances of concentrated wealth and power applied with precocious equality to all inhabitants, cleric as well as lay, military as well as mercantile. The laity had for a long time been accustomed to use the literate methods of the clerisy for their own purposes. By the fourteenth and fifteenth centuries the clergy were already so fully integrated into the society of the Italian towns that lay elites were able to write and speak for themselves with great eloquence in their own language and in Latin. The close biographical relationships between canonists and humanists in papal service—as for example in the cases of Petrarch and Alberti—is only one of the more charming clues to the characteristic history of the Italian laity.

In France, by contrast, the military aristocracy had maintained considerably more independence from other sectors of society. True, the French nobility did find itself confronted with a monarchy that was only too eager to work closely together with the papacy in order to subject bishops and noblemen to their

108 For some trenchant observations see Feyerabend, "Progress in Philosophy," and, from a different point of view, the celebrated opening chapter on "Las Meninas" in Foucault, *Order of Things*, 3–16.

109 For an instructive exception illustrating the manner in which a European-wide process could take on regional variations see Peters, *Inquisition*, where the inquisition of Southern Europe is viewed as something of a functional equivalent to witchcraft and magic persecutions in Northern Europe.

authority. Eventually the French monarchy therefore succeeded in concentrating far more power over a much {374 | 375} larger territory in its hands than the Italian cities were capable of doing. But that took longer, too. The grand experiment with a Franco-papal alliance fell apart during the Hundred Years War, not least because the papacy's universal claims did not make the creation of national papacies any more possible then than they do now. Gallicanism preserved a stature and independence for the French clergy that the Italian clergy had long lost. It was not until the days of Louis XIV that the nobility of France was finally domesticated in Versailles.

England was similar to France in that it produced a territorial monarchy out of the competition among a military aristocracy, and similar to the Italian city-states in that its forms of governance firmly embraced all layers of society. Whether because of Anglo-Saxon precedent, the Norman Conquest, repeated experience with rebellion and civil war, the geography of a large island, or all of the above, England developed a form of monarchical government in whose operations nobility, clergy, and townsmen were more closely involved from early on than in France or the Germanies. The Domesday Book is singular in European history. So are the early medieval English codes of law, the Exchequer, and the representative institutions developed for the government of the realm in the thirteenth century. England was the only European country that managed to produce a professional class of jurists who were not trained at universities but at the Inns of Court, did not rely on Latin but on Anglo-French, and did not receive Roman law in a formal sense but only as a model, relying for the rest on precedent and customary law. England is the only European state that was not only able to create a national church—the Gallicans managed to do that, too—but also to keep it running until today.

In the Germanies, by contrast, the fusion of nobility and clergy into the subjects of a political monopoly encountered greater obstacles than in Italy, Spain, France, or England. In the Germanies the attempt to reshape the early medieval clergy into a single, coherently structured body of literate celibates increasingly following the model established by the great monastic houses and led with increasing efficiency from Rome—which is to say, the main theme of the developments culminating in the Investiture Controversy—had encountered such powerful resistance that the tacit social contract designed to settle relations between nobility, clergy, and merchants was never put into more than piecemeal effect. Confronted with the hostility of an emperor who commanded by far the most powerful temporal government in eleventh-century Europe, Rome had hardly had any choice but to reduce its aspirations to rule over the German clergy, at least for the time being. In Italy the papacy could count on the support of cities, and in England and France it could count on the

support of monarchies. But in Germany there were no cities that could have stood comparison with those of Italy, and there was no monarch as well disposed towards the papacy as the king of France. Germany did not acquire its first universities until the fourteenth century, two to three centuries later than England, Italy, and France, and German cities grew only in the fifteenth and sixteenth centuries to a size and power that gave them the self-confidence and the critical mass of an educated laity long since available in Italy. The result has been well understood since the research of Aloys Schulte early in the twentieth century: the German nobility maintained its control over the church to {375 | 376} a degree that made it appear to be illiterate by comparison with the nobility of Italy, France, and England, and made the clergy seem corrupt.[110]

There is therefore a sense in which the conditions that had allowed the Gregorian Revolution to succeed in Italy, France, and England during the high Middle Ages did not obtain in the Germanies until the fourteenth and fifteenth centuries. That helps to explain why late medieval Germany was at first so particularly eager to promote the reform of the church that the Great Schism had made necessary, and why it drew with such great fervor on the medieval tradition of furthering the causes of the church by means of general councils. The Councils of Constance and Basel were the first general councils ever to meet on German soil and popular piety flourished in late medieval Germany as never before.[111] Yet the same circumstances may also explain why soon thereafter the Germanies broke, not just with the conciliar tradition, but with the Roman church itself in such a brutal and explosive manner that forever after they remained roughly evenly divided between two hostile confessions that were neither able to reconcile their differences nor to gain control over each other. No other large European country shared that fate.

The chief loser in all of this was doubtless the church. Thanks to its Roman inheritance and thanks to the monastic orders, the church had long known best just what it means to have a monopoly and how to put a stop to competition.[112] As early as the turn of the millennium the church had systematically not only claimed the right to a monopoly, but also managed to enforce that right against its imperial and episcopal rivals. In the papacy, the councils, the

110 A. Schulte, *Der Adel*; cf. Freed, *Friars and German Society*; Gibbs and Lang, *Bishops and Reform*.

111 B. Moeller, "Religious Life"; B. Moeller, "Piety in Germany"; Hamm, "Normative Zentrierung."

112 Walter Ullmann often exaggerated the degree to which the church exercised power from above, but not entirely without reason; see Ullmann, *Relevance*; Ullmann, *Growth of Papal Government*; and the searing critique by Oakley, "Celestial Hierarchies Revisited."

legates, the orders, the universities, and not least in canon law the church had created institutions with an authority that literally—by means of letters—spread over all of European society, outclassing by a considerable margin whatever military and urban elites were able to put into the field. In the military orders it had created its own armies and in the crusades its own war. The church had been the sole institution of genuinely European standing. Now it was forced to surrender power to rivals who had learned to imitate its methods. That was so much the bitterer in that the church had thought itself to be above the competitive fray. The lasting symbol for the bitterness of that defeat is the revealing contrast in which the small size of the Vatican State stands to the universal ambitions of its ruler. {376 | 377}

The church's loss is poorly understood in terms of secularization, much less of progress, though elements of both may be discerned.[113] Laicization might be a better term because it refers to the reproduction of spiritual government in the hands of the laity without necessarily denoting either a secular break with spiritual government or Protestant emancipation from Catholic repression.[114] But the search for a single term is more distracting than enlightening. "Laicization," after all, can also be taken to refer to anti-clerical attitudes accompanying the transfer of clerical authority into lay hands. What matters is that the church did not lose because its methods had been rejected by the laity but quite the contrary, because the laity had finally learned the lessons it had for so long studied in the church's schools. Now the laity demanded the right to exercise those methods in its own name and language; now it was time to graduate. The monopoly over the control of letters that the clergy had asserted and on which its power had chiefly rested was taken out of its hands—but it did not by any means disintegrate. Instead, it was placed into the hands of the laity, where it was henceforth put to more intensive uses, no longer under the guidance of the papacy, but in the chambers and bureaus of courts and city governments, no longer by celibate priests and monks, but by ministers, scholars, and scientists in the employ of the state. The power of the church was not dismantled or destroyed, but enhanced and transferred to state and nation. The nation is the church of the modern age and the state is its chief agent.[115]

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113 Blumenberg, *Legitimacy*, is right to question the concept of secularization, but for reasons almost diametrically opposed to those advocated here; cf. Lübbe, *Säkularisierung*; Oberman, *Contra vanam curiositatem*. {See now Davis, *Periodization and Sovereignty*.}

114 Strayer, "Laicization." Lagarde, *Naissance de l'esprit laïque*, and Stolleis, "'Konfessionalisierung'."

115 Southern, *Western Society*, 24, maintains that "The Middle Ages may be defined as the period in western European history when the church could reasonably claim to be

It prays at the altar of nature, receives its sacraments from priests of science, and is granted absolution for past sins by historians. Hobbes was the first who saw that clearly, and in this particular respect Rousseau explicitly agreed with him, pointedly stating that Hobbes owed his worst enemies, not to the mistakes he made, but to the truths that he uncovered.[116] {377 | 378}

The change that came over Europe in early modern times thus has a double aspect. On the one hand, it forced the church to give up power; on the other hand, it put the church's power into the hands of the laity, where it was used to new and improved effect. Seen from up close by its protagonists, it marks a break from the preceding history and the beginning of a new stage in the development of European society. In that sense, Luther was the papacy's implacable opponent, leading Protestant Germans thereafter to insist on what distinguished them from Catholic Italians, Frenchmen, and Spaniards, and to forget how much they had in common. Seen from afar, it marks the completion of the transformation of Europe that began in the eleventh century. In that sense Luther may be regarded as the true heir of Pope Gregory VII, and the indulgence controversy as the last chapter in the history of the Investiture Controversy—the moment when monk Hildebrand's desire to fix the

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the one true state, and when men (however much they might differ about the nature of ecclesiastical and secular power) acted on the assumption that the church had an overriding political authority." Figgis, *Studies of Political Thought*, 4, put it more strongly: "In the Middle Ages the Church was not a State, it was the State; the State or rather the civil authority (for a separate society was not recognized) was merely the police department of the Church."

116 "The laws of God, therefore, are none but the laws of nature, whereof the principal is that we should not violate our faith, that is, a commandment to obey our civil sovereigns, which we constituted over us by mutual pact with one another. . . . So that the faith of Christians ever since our Saviour's time hath had for foundation, first, the reputation of their pastors, and afterward, the authority of those that made the Old and New Testament to be received for the rule of faith—which none could do but Christian sovereigns, who are therefore the supreme pastors, and the only persons whom Christians now hear speak from God—except such as God speaketh to, in these days, supernaturally." Hobbes, 3.43, "Of what is Necessary for a Man's Reception into the Kingdom of Heaven," sec. 5, ed. Curley, 399–400. Cf. Rousseau, *Contrat social* 4.8, ed. Derathé, 285, and *Social Contract*, trans. Gourevitch, 146: "Of all Christian Authors the philosopher Hobbes is the only one who clearly saw the evil and the remedy, who dared to propose reuniting the two heads of the eagle, and to return everything to political unity, without which no State or Government will ever be well constituted. But he must have seen that the domineering spirit of Christianity was inconsistent with his system, and that the interest of the Priest would always be stronger than that of the State. It is not so much what is horrible and false as what is just and true in his politics that has made it odious." Cf. above, chap. 16.

boundary between the sacred and the profane at last took hold of the lands farthest removed from Roman antiquity; the moment when the spirit of Pope Gregory VII came to life again in Martin Luther and finally secured the victory over Saxony that Emperor Henry IV had prevented in the eleventh century.

For an illuminating case in point, take relations between men and women. On the one hand, the Protestant attack on clerical celibacy and the elevation of marriage helped to break up the male monopoly on the sacred that the church had claimed during the Middle Ages. Yet on the other hand the father of the household thereby acquired a new kind of male monopoly that was neither identical to that of the medieval priest nor unrelated to it either. 'Church' comes from the Greek *kurios*, 'lord'; it means 'house of the lord.' During the later Middle Ages, religious lay women's increasingly pronounced assertion of their right to compete with men for access to the sacred had caused growing anxiety about the durability of the monopoly the clergy had exercised over the 'house of the lord' since the eleventh century.[117] By taking religious power out of the clergy's hands, placing it into those of the father of the family, making each father a new kind of spiritual lord in his own house, and turning his house into a little church, the Reformation put a stop to that anxiety.

Thus Protestants, while seeming to break with Catholics, did nothing more effectively than to reinforce a hierarchical distinction between men and women that had once been a special prerogative of the clergy by extending its reach into the intimacies of private and domestic life for the remainder of modern history.[118] With its left hand the Reformation forced the reverend fathers of the church to surrender their authority; with its right hand the Reformation gave that authority to the father of the family—{378 | 379} and made sure to exempt his conduct from undue interference by the state just as the papacy had once made sure to exempt the conduct of the clergy from undue interference by the laity. What had been benefit of clergy became the sacrosanctity of hearth and home. The views of Jean Bodin, the first great theorist of sovereignty in the history of modern political thought and by no means coincidentally an avowed admirer of Pope Innocent IV's ideas about absolute power, make for a telling combination: uncertain in his religious affiliation, but utterly confident in his insistence on the father's right to rule his house and family with an authority as absolute as any sovereign's right to rule the commonwealth.[119]

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117 Bynum, *Holy Feast*.

118 Ozment, *When Fathers Ruled*; Wunder, *He is the Sun*; Wiesner, *Women and Gender*.

119 Note especially the approval with which Bodin referred to a law of Romulus allowing the husband to kill his wife "without any formal process of law . . . when she was taken in adultery, for substituting a child not his own, for having duplicate keys, or for

On this understanding the Reformation loses its singularity. It no longer amounts to a break with the preceding development of Europe but, quite the contrary, its continuation and even intensification. It was part and parcel of a single process of social development that began around the turn of the millennium, that was European-wide, that was carried forward by Protestants and Catholics alike, and that continued without interruption across the temporal and spatial boundaries conventionally placed between the European nations and medieval and modern history. That process transcends the local, temporal, political, social, and intellectual differences between the European nations (Germany, Italy, Spain, France, England, . . .) as well as those between the confessions (Catholics, Lutherans, Calvinists, Anglicans, Gallicans, Puritans, Jansenists, Pietists, Methodists, Baptists . . .) without extinguishing their historical significance. It did not have to wait for the Reformation to make asceticism inner-worldly.[120] It shaped European history as early as Pope Gregory VII's struggle with Emperor Henry IV and as late as Bismarck's *Kulturkampf* with the Catholic Church. It forms a background to the whole of European history; indeed, it *is* the history of Europe. The Reformation merely opened a new chapter in that history. It made for a change of scenery, advanced the plot, and heightened the drama. But it did not change the script. It passed on to the early

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being habitually drunk," his restriction of citizenship to heads of households, and the complementary relationship between the roles taken by citizens in public and fathers at home: "When the head of the family leaves the household over which he presides and joins with other heads of families in order to treat of those things which are of common interest, he ceases to be a lord and master, and becomes an equal and associate with the rest. He sets aside his private concerns to attend to public affairs. In so doing he ceases to be a master and becomes a citizen, and a citizen may be defined as a free subject dependent on the authority of another," namely, the sovereign; Bodin, "Six Books of a Commonweale," 231, 237. Concerning Pope Innocent IV Bodin maintained that he "best understood what absolute power is, and made {Christian} kings and emperors bow to him." Bodin, *On Sovereignty* 1.8, trans. Franklin, 13. The clarification '{Christian}' was supplied by Franklin on the basis of the Latin text.

120 M. Weber, *Protestant Ethic*, was right to focus on inner-worldly asceticism as crucial to the history of modern Europe, but wrong to seek its sources in Protestantism. Like so many other developments supposedly originating in the Reformation, inner-worldy asceticism, too, is much better understood as grounded in high medieval changes that, among many other things, led the secular (!) clergy to adopt monastic ways of life: "Converting the world into a school or foyer for heaven," as Mundy put it, "the clergy began to absorb the intense sense of vocation that had once marked the withdrawn religious." Mundy, *Europe in the High Middle Ages* (2000), 16. Cf. Trevor-Roper, "Religion"; H. Lehmann and Roth, eds., *Weber's Protestant Ethic*.

modern laity what the medieval clergy {379 | 380} learned from monks. A new theology appeared, but in the service of a goal that had long since been fixed.

Nor is the Reformation German. The Reformation rather is the conscious German expression of an unconscious social transformation that took place in all of Europe, differing here and there according to the circumstances shaping it differently in different regions, always depending on the success with which the church had previously exercised its claims to leadership, the compromises it had been forced to make, and the extent to which the laity had managed to assert its mastery of the church's methods. In Italy the same unconscious transformation found conscious expression under a different name in movements now known as Renaissance and Humanism. The national peculiarities of Germany, England, France, Italy, and Spain are neither essential marks on their respective national bodies nor are they merely figments of the imagination. They reflect the differential speed and intensity with which the cultural leadership of the church first spread all over Europe and was then taken over by the laity. To view the Reformation in terms extending no further back in time than somewhere in the late Middle Ages, no further out in space than where Germany meets Italy and France, and no deeper in thought than where Protestants disagree with Catholics is to force it into a frame too small to fit historical reality.

4 Hegel's Ghost

The case proposed on the preceding pages proves, I hope, that it is possible to view the Reformation as part of European-wide developments beginning around the turn of the millennium. To prove that it is possible is obviously not enough to prove that it is true. But it is enough to pinpoint the reason why the possibility that it is true has been ignored. That reason consists of the understanding that Protestant reformers and their opponents had of each other and themselves. From the perspective of Martin Luther, John Calvin, Ulrich Zwingli, King Henry VIII, John Eck, St. Ignatius of Loyola, or Pope Paul IV, the Reformation was obviously nothing like a continuation of the endeavors of the Catholic Church. Never mind how many similarities between Protestants and Catholics historians can document today, and how energetically Protestant reformers in fact accelerated processes that had been started by the Catholic Church, in their own minds there was no doubt that they had broken with tradition (or, making the same point in reverse, that for the first time in centuries they had succeeded in restoring the true faith of the ancient church) and therefore cast Europe into religious war. Everywhere, but specially in

Germany—from Hutten and Luther down to Hegel and Ranke—the break with the tradition went hand in hand with new forms of affection for one's nation, and new forms of denouncing the nation of another.[121] There was no double aspect to Luther's understanding of himself.

The self-understanding of the protagonists in the early modern transformation of European society is obviously crucial for the history of the Reformation. But it is not to be confused with a proper understanding of that history. If we are to form an {380 | 381} understanding of our own—one that does not simply repeat what the contemporaries thought but puts their thought into historical perspective—the agents' self-understanding must neither be ignored nor left untouched. It must rather be taken as a historically necessary precondition for the good conscience they needed to promote their cause under the circumstances of their time and place. The less experience they had with the church and its methods, the more they needed to fortify themselves in order to be able to rebel against the sacred authority of the pope, take it into their hands themselves, and thus violate the great taboo of medieval Europe. Germany, where the church had until recently been kept at a noble distance from the laity, required all of the good conscience that Luther's theology was able to lay upon the table. People like Machiavelli and Guicciardini lived closer to the metropolis. Their intimacy with the church was such that they never had to break with it officially, and since they did not need to break with it, they could do without the theology that was elsewhere needed urgently in order to legitimate rebellion. The Protestant self-consciousness of having broken with the medieval past is no good evidence against the underlying continuity. It should instead be seen as part of that continuity—the engine that moved the process forward by convincing the participants of the justice of their cause.

The same case should be made for Catholics, but with the parameters reversed. In Catholic self-understanding the Catholic Church did the opposite of what the Protestants were doing: it maintained an immutable tradition. But that does not disprove the reality of changes in Catholicism any more than the Protestant self-understanding of having broken with the past disproves the underlying continuity. On the contrary, the importance attributed by modern Catholicism to its own immutability contrasts sharply with the innovative spirit displayed by its high medieval predecessor in the creation of an entire new body of canon law, new orders, new forms of religious life, and a church

121 On the relationship between nationalism and the Reformation in general see Anderson, *Imagined Communities*. Cf. Ranum, ed., *National Consciousness*; Schmugge, "Über 'nationale' Vorurteile."

government the likes of which had never been seen before.[122] The Catholic insistence on continuity without rupture and the Protestant insistence on rupture without continuity are mutually reinforcing distortions of the process by which the power of the medieval church was transferred to the modern laity and reproduced in secular forms.

Thus it is possible at last to give an answer to the question from which source Hegel's ghost has drawn its uncanny ability to prevail over the tools of critical historical analysis and continue to assert the singularity of *the* Reformation against all new and old attempts to show the opposite. It has drawn that ability from the historians themselves. When they speak about the Reformation, they now rarely do so with the unselfconscious pride in nation and confession that was common a century ago. But they continue to identify with the self-understanding of early modern Europeans as Protestants and Catholics, Reformers and Counter-Reformers, Germans and Italians, French and English, humanists and theologians to a degree of which they are not sufficiently aware.[123] That blinds them to the commonalities of European history.[124] {381 | 382}

To blame them for that would be both churlish and unfair. Historians might just as well be praised for the unswerving loyalty with which they keep repeating principles laid down by their precursors. Historians are, after all, the lineal descendants of the same early modern humanists and reformers who did the most to put the self-understanding of early modern Europeans into a lasting

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122 As Geoffrey Barraclough put it, "It is one of the great paradoxes of history that the papacy, as we think of it today, is in most essential ways a creation of medieval Europe." Barraclough, *Medieval Papacy*, 9.

123 Bernd Moeller himself may be taken as a case in point. He is widely acknowledged to have played a crucial role in reclaiming the history of the Reformation from theologians. But it is often forgotten that he sought to reclaim it for *church* history, insisted on Luther's role as a theologian, and stressed the spiritual value of the Reformation: "To put it in a nutshell, it seems that we are threatened with losing the Reformation as an event in *church* history. . . . We have scarcely come to terms with the most basic, incongruous, and unprecedented aspect of the whole Reformation: that it was a theologian who unleashed a revolution in world history and forced his rule on that revolution, and what is more, that he was the most profound of all the theologians. . . . We need the spiritual and intellectual energies the Reformation has to offer." B. Moeller, "Problems," 7, 12–13, 16 (emphasis in the original). The invocation of those "spiritual energies" is essential to the project Moeller started. It tends to be forgotten because it cannot be remembered without provoking the very disagreements over confessional and national boundaries contemporary Reformation historians have been trying to allay.

124 For two exceptions from the history of literature see Curtius, *European Literature*, and Auerbach, *Mimesis*. Rabb, *Struggle for Stability*, places a similar emphasis on the need to examine European-wide developments, but without tracing them back beyond the late Middle Ages.

set of words. Small wonder that historians identify with people to whom they owe their own professional existence. Small wonder that, all efforts to the contrary notwithstanding and sometimes to their own surprise, they keep arriving at an understanding of early modern times that does nothing more successfully than to confirm the power of the very national and confessional boundaries whose history they had intended to illuminate. Nothing else should be expected until historians learn how to distance themselves from national and confessional criteria to a point where they can either openly acknowledge their personal belief in them, or treat them as the fossilized remainders of the comparisons that early modern Europeans used once upon a time to make with each other and their forebears in order to determine who they were and what they ought to do in circumstances long since gone.

This diagnosis applies directly to the combination of Reformation history with social history that has in recent decades done so much to cast fresh doubt upon the significance of confessional and national criteria for our understanding of the Reformation. It explains why the social history of the Reformation still consents to chronological, conceptual, and geographical boundaries first drawn by early modern humanists and theologians. The echoes of early modern history reverberate only too audibly in the contemporary scholarship.[125] In order for historians to stop fighting early modern battles it is not enough to extend historical investigations into the realm of society—as if the concept of *the* Reformation would not have to be entirely rethought; as if salting the Reformation with social history would be enough to change the ingredients from which the dish was made. It is not enough to add complexity and diversity by showing how *the* Reformation in one context differed from *the* Reformation in another. It is not enough to refrain from national or confessional polemics or to extend the history of the Reformation into the later Middle Ages. The history of the Reformation must begin, not with Luther, but with Pope Gregory VII; not with the indulgence controversy, but with the Investiture Controversy; not with Germany in the sixteenth century, but with Europe in the eleventh century. {382 | 383}

What we call Europe did not even exist until the high Middle Ages.[126] What did exist was an assemblage of barbarian successor states to the Roman Empire that could not hold a candle to the Byzantine Empire in the Southeast or

125 {Where Gregory, "Other Confessional History," and Gregory, *Unintended Reformation*, has begun to shout them from the rooftops, they may well become deafening.}

126 For a contrary position making an unusually interesting and original case for seeking the origin of Europe's peculiar history (mostly) in the early Middle Ages see Mitterauer, *Warum Europa?*, recently translated into English as *Why Europe*?; cf. the periodization of Slicher van Bath, *Agrarian History*.

Islamic Civilization in the South and West. The ability of one unusually aggressive and long-lived chief astutely combining the surviving vestiges of Roman imperial governance with shrewd diplomacy and ruthless military force to gain control over a large swathe of the continent within borders that foreshadow the political and cultural shape of modern Europe does not suffice to prove the opposite. Charlemagne spent most of his life on horseback, he had no capital that could compare with the brilliance of Constantinople, Baghdad, or Córdoba, and the realm he cobbled together fell apart soon after he died. It was only around the beginning of the second millennium that Europe acquired political, social, and legal institutions durable enough to survive the demise of a ruler and sustain a distinctly European culture. These were the foundations on which Europe created for itself a uniquely governmental church, a system of national states, a vibrant agricultural economy, self-governing urban republics, and the rest of the features commonly included in the inventory of European accomplishments. These were the means enabling Europe to reshape the culture of the continent in the process Robert Bartlett has called the Europeanization of Europe, and later on to extend its reach across the globe.[127] If there was a fundamental break in European history, then its coordinates were neither national nor confessional, and it occurred either five centuries before the Reformation, in Moore's *First European Revolution*, or three centuries later, in the demographic transition, industrialization, and massive urbanization of the nineteenth century.

From this perspective early modern theological inventions, the humanistic turn to classical antiquity, the point of transition when the internal colonization of Europe spilled over into external colonization, the invention of printing, the so-called discovery of the New World, the so-called Scientific Revolution, and the various other early modern developments to which the Reformation has traditionally been linked have only subordinate significance for the periodization of European history. Primary significance goes to the development of European society and culture as a whole. By this criterion, the early Middle Ages have to be viewed as part and parcel of antiquity: the tail-end of a long-drawn-out process of disaggregation by which the urbanized Mediterranean civilization of Greek, Hellenistic, and Roman antiquity came to be divided into a Greek-Orthodox East, an Arabic-Islamic South, and a Latin-Germanic West. The centuries around the turn of the millennium make for a new beginning in the history of a Latin-Germanic world best understood by contrast with the worlds of Byzantium and Islam: the first European revolution. The high

127 Bartlett, "The Europeanization of Europe," *Making of Europe*, 269–91; cf. Abu-Lughod, *Before European Hegemony*.

and late Middle Ages become the early (medieval) phase of European history properly speaking. The later (modern) phase of that same history includes the demographic transition, the Industrial Revolution, and the scientific mastery of nature—changes of such magnitude {383 | 384} that they displaced not only the three successors to Mediterranean antiquity from the prominent station they had occupied in the history of the world so far, but also every other one among the great agrarian civilizations that had spread across the world since the invention of agriculture during the Neolithic.

That is the frame of reference in which the Reformation must be placed. Otherwise the question about the relationship between the Reformation and the Middle Ages as a whole will remain as impossible to answer as it was forty years ago, when Bernd Moeller charged historians with having lost sight of it.[128] The task is to explain the Reformation, the nations, and the confessions by writing the history of European society as a whole, without assuming the nation or the confession as a given.[129] The relationship between the Reformation and social history must be reversed. The history of society must come first, and it must dictate its own terms. Only thereafter can the history of nations and confessions be properly understood. For society—by which I mean human beings and the constantly changing relationships in which they engage with each other—is the proper subject matter of historical investigation.[130] *The* Reformation is merely the form that subject matter took on a particular occasion in a particular area of Europe.

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128 "We have nearly lost sight of the historical problems of the *relationship of the Reformation as a whole to the Middle Ages*. This is the question of how Europe was made ready for the Reformation, of how the Reformation broke away from the Middle Ages, and of how the Middle Ages survived within the Reformation." B. Moeller, "Problems," 12 (emphasis in the original).

129 Notwithstanding his sharp focus on the sixteenth century, the radical spirit of Febvre's conclusion to "Origins of the French Reformation," 88, first published in 1929, is still very much to the point: "Specificity, dating and nationality are words which need to be struck off the historian's vocabulary list. They are problems of no substance—stuffy old controversial subjects, old cast-offs which still lie around in our books of learning. The task which all of us have before us is to undertake a methodical study of Christianity at the beginning of the sixteenth century, an analysis of that great crisis from which for some it emerged rejuvenated and renewed, for others diminished and mortally wounded. We must not swerve from a comprehensive study of that century which was so full of consequences. No single generation of historians will be able to complete it. All the more reason to concentrate our efforts and not to waste them in sterile repetition."

130 As Elias explained particularly clearly and convincingly in his "Introduction to the 1968 Edition," *Civilizing Process*, 181–215.

Historians who really wish to make a radical break from the confessional and national narratives that have dominated Reformation historiography since the nineteenth century must therefore learn how to begin the history of the Reformation around the turn of the millennium. As long as they continue to begin in late medieval and early modern times, they will unwittingly endorse the old agreement between Catholics and Protestants that the main question is whether you ought to side with or against the governmental church that was established in the eleventh century. Even if they do not regard the Reformation as the single most important movement in European history since the collapse of the Roman Empire and do not openly identify with one or another nation or confession, they will continue to be fighting Hegel's ghost.

5 Epilogue

One question is worth asking in conclusion: So what? What difference does it make to substitute one kind of periodization for another? Does it amount to anything more than restating in slightly different and perhaps more dubious terms what we knew all along? The answer is, I think it does. {384 | 385}

It is of course completely true that many different criteria can be used to divide the past into distinct periods. Humanists relied on the quality of Latin; Protestants relied on a certain interpretation of Scripture; Germans relied on their relationship to the Roman Empire; and so on. Speaking in the abstract, each of these criteria is just as useful as the others. All other things being equal, dividing world history into periods according to the frequency of references to Cicero is just as useful as dividing it according to the number of eggs eaten boiled, fried, or poached, or the volume of carbon dioxide humans have placed into the atmosphere. From that point of view historical periodization is nothing but an arbitrary fancy, and my choice of Europe's social development as a criterion of periodization merely one among indefinitely many equally arbitrary possibilities no worse or better than the others.

But all other things are never equal. The choice of the criteria we use to settle questions of periodization cannot be made in the abstract. It is made in the context of the same history whose periodization is at stake. That context is given and concrete, and therefore subject to debate and to historical development. It changes as time goes on. So do, accordingly, criteria of periodization. Their changes are themselves a clue to history. They are by no means arbitrary or abstract, and they cannot be made at will. There are good reasons—reasons rooted in history—why the succession of four different world monarchies once served as an attractive criterion with which to divide the history of the

world into successive periods. There are good reasons, too, why that form of periodization lost its attractiveness, and why it was replaced with the division into ancient, medieval, and modern history.

The same is true today: neither nations nor confessions—and certainly not the quality of Latin—play the role today they played five hundred years ago. Today it is difficult not to reckon with two points that militate against the role traditionally assigned to the Reformation in the periodization of European history. One is the right of all human beings, male and female, young and old, to stake their own claims on the world. That right demands that we write history in light of the restrictions placed on it at different times and places by social, political, and intellectual contingencies allowing some to gather more than their fair share of power, wealth, and knowledge, and write it without respect to "race, color, religion, sex, or national origin," to quote a standard formulation from American employment law. The other is the amazing lack of respect for custom and tradition—both their own and that of others—with which Europeans of every confession and every nationality have ever since the eleventh century sought to remake the world in their own image. Intramural differences between Protestants and Catholics or between medieval and modern Europeans merely conceal that central fact of European history. Until that fact is properly acknowledged, historians will not know how to assess the mixture of admiration and hostility with which Europeans have been met across the globe.

The conventional periodization of European history is therefore more than just a harmless means of laying out the past. It is a crucial ingredient in the unconscious grandiosity with which Europeans have asserted their superiority over the rest of the world. Hegel's confidence that modern Europe—what he called the Germanic world—stood at the pinnacle of history, towering high above medieval Catholicism, ancient republics, and Oriental despotism, is merely an unusually salient instance of {385 | 386} that grandiosity. His ghost hovers not only over the history of the Reformation, but also over Europe's relations to the rest of the world. To challenge the traditional periodization of European history is therefore more than an exercise in chronology. It is a necessary step in the pursuit of a perspective that does justice to European history without endorsing Europe's lack of self-understanding.

That is the perspective from which I have tried to sketch the history of the Reformation. There is of course no guarantee that my sketch, even assuming that it is found to be convincing, will at some future point in time not look as quaint as sketches of world history based on the succession of Babylonian, Persian, Greek, and Roman monarchies look today. Far be it from me therefore to maintain that the perspective I have proposed is uniquely valid. I have my

doubts about its validity, and in another setting I would be glad to share them with my readers. But that would require a discussion, not of the relative weight to be attributed to the changes wrought at different times in European society, the degree to which those changes can be explained by combining Elias's "monopoly mechanism" with Gellner's "general form of the social structure of agrarian societies," or the need to expand the frame of reference from Europe to the world, but rather of the purpose and the limits of our knowledge of the past itself.[131]

In the present setting I have tried to make a simpler and more restricted point, namely, that the national and confessional blinkers worn by historians of the Reformation remain much bigger than they like to think. I have tried to reveal the extent to which, all protestations to the contrary notwithstanding, Reformation history continues to be written in the name of nation and confession. I have tried to do so by showing that it is possible to think about the place of the Reformation in European history in terms as far removed from those most commonly employed by professional historians today as scholarship, a certain familiarity with medieval and early modern history, and the limits of my historical imagination allowed me to take them. Whether or not I have succeeded I leave my readers to decide.

131 The kind of discussion I tried to conduct in *Limits of History*.

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